85-1779

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE SYNANON CHURCH,

Petitioner,

v.

STUART A. BERNSTEIN, *et al.*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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89 pp

QUESTIONS PRESENTED

1. A. Whether a court may, consistent with due process, dismiss a claim upon a finding of "fraud upon the court," where that fraud consisted of findings of destruction of evidence, and misleading statements concerning that destruction, not material to any issue going to the claim dismissed.

B. Whether the implicit holding of the court below that materiality of the evidence destroyed is not an essential factor in the assessment of whether a claim should be dismissed is violative of this Court's holding in *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322 (1909), recently reaffirmed in *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982), and is in direct and irreconcilable conflict with decisions of the United States Court of Appeals for the Ninth Circuit in *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334 (1985); *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585 (1983); *Phoceene Sous-Marine S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802 (1982), and other courts.

2. Whether the trial court below, in attempting to find materiality, misconstrued and misapplied this Court's holding in *Bob Jones University v. United States*, 461 U.S. 574 (1983), to arrogate unto itself the power to declare unilaterally the public policy of the United States, as applied to the Internal Revenue Code, and of the District of Columbia, as applied to its land use statutes and regulations.

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals issued on January 29, 1986, which affirmed the decision of the Superior Court of the District of Columbia dismissing petitioner's complaint.

OPINIONS BELOW

The opinion of the District of Columbia Circuit of Appeals (App. A, *infra*, pp. 1a) is reported at 503 A.2d 1254. The opinion of the Superior Court of the District of Columbia (App. B, *infra*, pp. 38a) is not reported.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered January 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATEMENT OF FACTS

Petitioner, The Synanon Church (hereinafter "Synanon")[1], a California nonprofit religious corporation, brought suit for fraud in the sale of an apartment building by Respondents Stuart A. Bernstein and Samuel J. Kushner (hereinafter "Bernstein"). Respondent Coldwell Banker & Company was the real estate brokerage house, and Respondent James H. Kabler, III, was the broker involved in the transaction.

Synanon alleged that it advised Kabler that Synanon desired to move its headquarters to the District of Columbia and that it, Synanon, wished to buy a property that it could use for offices. (Siegel Dep. 26-28; Kabler Dep. 59-63).[2] Kabler showed the Synanon representatives the Boston House, which Bernstein then owned. (Kabler Dep. 65-66). Negotiations ensued, during which both Kabler and Bernstein were aware that Synanon desired to use the property for offices.

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[1] The case below is entitled *Synanon Foundation, Inc. v. Bernstein*. Since the commencement of the case below, Synanon changed its corporate name to The Synanon Church.

[2] The record citations are to documents in the Appellant's Appendix in the court below. A copy of the Appellant's Appendix as well as a copy of the Appendix of Appellee Bernstein, also filed in the court below, are lodged with the Court for the purposes of this petition.

(Kabler Dep. 85-86; Siegel Dep. 53-54). Synanon alleged that during these negotiations both Kabler and Bernstein were aware that, while the Boston House was in an area that was zoned for office use by nonprofit organizations, it could not be used for that purpose because its floor-load capacity did not permit office use. (Grene Dep. 24, 28; Kabler Dep. 57-58). Synanon asserted that, despite this knowledge, both Bernstein and Kabler assured Synanon that the property could be used for offices.[3] (Kabler Dep. 85-86; Siegel Dep. 53, 68-72).

Based upon those assurances, Synanon signed a contract for purchase of the property, paid a $250,000 deposit (Agreement of Sale; Bernstein Dep. 5/18/83, 77), and, by agreement, occupied a part of the building prior to settlement, putting money into changing apartments into offices. Difficulties occurred and Synanon discovered that, because of the lack of adequate

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[3] At all times relevant to this case, the D.C. Building Code provided that a building that is zoned for offices may not be so used unless the floor-load capacity was 100 pounds per square foot on the first floor and at least 60 pounds per square foot on higher floors. Both Bernstein and Kabler were aware at the time of Synanon's inquiry that the floor-load capacity of the Boston House as designed was only 40 per square foot for the upper floors and 70 pounds per square foot for the lobby, therefore rendering the building sufficient for apartment use but insufficient for office use. One week before the Synanon representative first contacted Coldwell Banker, a potential purchaser of the Boston House, a Mr. George Genung, had decided not to bid on the structure because the floor-load capacity was insufficient for his contemplated office use. (Grene Dep. 28; Genung Dep. 9). This fact was communicated to Kabler by Jeffrey Grene, an agent of Coldwell Banker. Kabler then informed Bernstein that since the floor-load capacity was too low Mr. Genung was no longer interested in the building. (Kabler Dep. 57-58).

floor-load capacity, it could not occupy any part of the Boston House for offices. (Scherr Dep. 36, 40-42, 108).

Synanon thereupon moved out. Both sides attempted to rescind the contract. Bernstein retained the $250,000 deposit.[4] Synanon thereupon brought the instant lawsuit for the return of the deposit, for reimbursement of monies spent changing apartments into offices, for the cost of moving people to the District of Columbia in reliance upon the availability of the Boston House for offices, and for punitive damages based upon fraud.

Bernstein, Kabler, and Coldwell Banker counterclaimed for fees that they assert Synanon had agreed to pay (and had not paid) for apartments which it occupied, for damage to the building, for economic damage suffered through loss of good will and unhappiness among remaining tenants, and for fraud. The fraud claim was based upon the assertion that officers of Synanon had represented falsely that Synanon was a peaceful, nonviolent organization.

After various discovery proceedings, including hearings on motions to compel and for sanctions, the Superior Court found that Synanon had failed to turn over all of the tapes and papers that were sought in discovery,[5] that some tapes and documents were sys-

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[4] Sometime in 1980 or 1982 (Bernstein could not remember which), Bernstein deposited the quarter of a million dollars, plus accrued interest, into the Boston House operating account. (Bernstein Dep. 5/18/83, 77-81).

[5] The motion for sanctions, upon the basis of which the Superior Court dismissed Synanon's claim, asserted that Synanon had failed to produce some fifteen identifiable tapes. Motion To

tematically and deliberately destroyed by Synanon, and that officials of Synanon, including two in-house counsel, made misrepresentations to the Superior Court in the course of discovery motions. App. B at *e.g.* 46a, 47a, 51a, 57a-61a. The subject matter of items found to be destroyed was "violence, money, purchase of guns, legal terror tactics, Holy War, changing partners or love match." Id. at 54a.

The Superior Court found that, under this Court's decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983), these items were relevant to the issue of whether, under the public policy of the United States, Synanon could be a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. The court went on to decide that, if Synanon is not tax-exempt under the Internal Revenue Code, then it could not be a nonprofit organization under the District of Columbia Zoning Regulations, and thus it could not *use* the Boston House for offices. Presumably, the Superior Court also concluded that because, under this analysis, Synanon could not use the Boston House for offices it also could not *own* the Boston House.

The Superior Court held that Synanon's conduct constituted a fraud upon the court and dismissed the contract claim. The court held the counterclaim for further proceedings.

Upon appeal, the District of Columbia Court of Appeals affirmed, holding that the conduct of Syna-

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Dismiss, 7/25/83, pp. 8-12. During this same period, Synanon produced in this and other litigation literally hundreds of thousands of documents and well over 2,000 tapes, all of which was available to Respondents in this case. See Afd't of Missakian, 9/22/83.

non constituted fraud upon the court and, under *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), and other federal rulings, dismissal was warranted. The Court of Appeals *sub silentio* rejected Synanon's argument that, for the sanction of dismissal to be valid, the wrongdoing found must have been material to the issues in the dismissed contract claim.

The author of the Court of Appeals opinion, in a "separate statement," App. A at 21a, agreed with Synanon that, for a valid sanction of dismissal, the wrongdoing had to be material to the issues on the dismissed contract claim, and that the evidence of violence, Holy War, sexual conduct, etc., had nothing to do with the issues raised by that claim.

REASONS FOR GRANTING THE WRIT

This case presents two issues warranting further review by this Court. One is in an area in which there is much turmoil in the courts, both federal and state, of the nation: the control by courts of misconduct by parties and by attorneys. Sanctioning of parties, of course, is permissible, and is growing. But the sanctioning power of courts is not without limit. This Court has made clear that due process requirements must be observed. And one of those due process requirements is that the wrongdoing found must be material to the issues in the claim dismissed as punishment. The court below rejected the argument that materiality was essential and was missing. This ruling, highlighted by the fact that it was the basis of the "separate statement," is in direct contravention of the rulings of this Court, most recently reaffirmed in *Insurance Corporation of Ireland v. Compagnie des*

Bauxites, 456 U.S. 694 (1982), and is in direct and irreconcilable conflict with decisions of other courts.

The second issue, which goes to the materiality of the evidence that the trial court found to have been destroyed, concerns the meaning and application of this Court's recent decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983). If this Court adheres to its previous rulings concerning materiality, then the trial court's treatment of *Bob Jones* becomes a significant factor in this case. The trial court assumed power never given in *Bob Jones*: the power of a single judge of the Superior Court of the District of Columbia, without any involvement by the legislative or executive branch of either the United States or the District of Columbia, to declare the public policy of both and to enforce it by decree. That arrogation of power was not authorized or contemplated by *Bob Jones* and is a most dangerous expansion of the holding in that case. Moreover, it is a method of treating the evidence found to have been destroyed as "material" that defies both logic and due process.

Each of these issues justifies the intervention of this Court in this case.

A. This Court recently addressed the due process limits on disciplinary sanctions in *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). While that case arose under Rule 37(b) of the Federal Rules of Civil Procedure, this Court made clear that Rule 37(b) "itself embodies the standard established in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), for the due process limits" on dismissal as a sanction. 456 U.S. at 705. See to the same effect, *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958).

Breaking down those limits found in Rule 37(b), this Court in *Insurance Corporation* found two standards: "First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." 456 U.S. at 707.

Turning to *Hammond Packing*, it is clear where the due process limits are. In *Hammond*, as here, there was a finding of a failure to produce evidence. In *Hammond*, as here, the trial court made factual inferences from its finding of the failure to produce evidence. But in *Hammond*, as an essential part of its due process analysis, this Court stated that the facts presumed from the failure to produce evidence were "material facts," and that "the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense" toward which the non-produced evidence would have gone. 212 U.S. at 351, quoted in *Insurance Corporation*, 456 U.S. at 705, and in *Societe International*, 357 U.S. at 210. And in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 338 (1944), the manufactured evidence went to the central issue of the case.

The need for materiality of the evidence found to have been destroyed by Synanon was raised in the court below. And the absence of materiality formed the basis of the separate statement in the court below. Thus, the absence of materiality could not have been overlooked by the majority. By its holding that the dismissal by the trial court was within its discretion, the majority rejected that argument. In so doing, it acted in contravention of due process.

Moreover, the ruling of the Court below is in direct conflict with holdings of the United States Court of Appeals for the Ninth Circuit. As that court stated in *Phoceene Sous-Marine v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 803 (1982):

> This appeal requires a determination whether a district court may enter a default judgment against a defendant as a sanction for the defendant's deceiving the court on a matter wholly unrelated to the merits of the defendant's case. We conclude that the entry of default under such circumstances is inconsistent with the requirements of due process and therefore reverse . . . .

In *Phoceene* the district court had found that a defendant, Samuel Lecoq, "had willfully deceived the court," struck the defendants' pleadings and entered default judgment against them. Id. at 805. Yet, because the willful deception did not go to the merits of the defense, the Court of Appeals held that the default judgment was a denial of due process. In so concluding, the Ninth Circuit recognized the due process limitations imposed upon it by this Court in *Hammond Packing Co., supra,* which it stated "was premised on the idea that one may reasonably infer from the suppression of *relevant evidence* that the defendants' case is lacking in merit. *Id.* at 351 . . . ." 682 F.2d at 806. (emphasis supplied).

This holding was repeated in *Wyle v. R.J. Reynolds Industries Inc.*, 709 F.2d 585 (9th Cir. 1983). In *Wyle* the court recognized that "courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice." 709 F.2d at 589. But, the court went on, "the requirements of due process limit the court's exercise of its inherent power. . . . Dismissal is a permissible

sanction only when the deception relates to the matters in controversy . . ." Id. Applying this Court's ruling in *Insurance Corporation*, the Ninth Circuit declared: "Sanctions interfering with a litigant's claim or defense violate due process when imposed merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case. *G-K Properties v. Redevelopment Agency*, 577 F.2d 645, 648 (9th Cir. 1978)." 709 F.2d at 591. In *Wyle* the court found that the necessary materiality existed and affirmed.

The Ninth Circuit again addressed the issue just last year in *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334 (1985). There the district court had found that the defendants repeatedly had violated discovery procedures and orders of the court concerning discovery, including the filing of incomplete and misleading answers to interrogatories. The district court imposed sanctions, including a judgment on liability. 762 F.2d at 1337. The Ninth Circuit reversed, again referring to the "due process limits" that require "the deception [to relate] to the matters in controversy." 762 F.2d at 1338. The reversal was on the ground that the conduct "did not deceive the court about the issues in controversy or threaten to interfere with the correct decision of this case, nor can it be characterized as 'utterly inconsistent with the orderly administration of justice.' " Id.

This same concept has been central to other decisions, as well. The Fourth Circuit, for example, in *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 675 F.2d 1349 (1982), was faced with fraud in the form of manufactured evidence and perjury on the part of a trucking company. The union

argued that "once fraud enters the case in any manner, the judgment must be vitiated without further inquiry as to the materiality or effect of the fraud on the judgment," relying upon *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944). The Fourth Circuit rejected that argument, holding that, with the possible exception of a case containing no more than a single cause of action, "materiality may well be a proper inquiry." 675 F.2d at 1354.

The First Circuit has recognized that "the centrality of the evidence at issue" is an important factor in weighing whether a default judgment was a proper exercise of a trial court's inherent power. *Brockton Savings Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d at 5, 12 (1985). And the New Jersey Supreme Court, in an oft-cited and quoted opinion by Justice Brennan, declared: "Perjured testimony that warrants disturbance of a final judgment must be shown by clear, convincing and satisfactory evidence to have been, not false merely, but to have been wilfully and purposely falsely given, and to have been material to the issue tried and not merely cumulative but probably to have controlled the result." *Shammas v. Shammas*, 9 N.J. 321, 88 A.2d 204, 208 (1952).

The importance of this issue is clear. As this Court well knows, since this Court's decisions in *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976), and *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), the number of cases of sanctions has multiplied. The limits upon the use of sanctions have assumed a new importance. Courts must be ever "mindful of the teaching" of this Court that "because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and

discretion." *Roadway Express*, 447 U.S. at 764, and *Brockton Savings Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 12 (1st Cir. 1985). And the limits of due process must be adhered to.

In the instant case, the briefs in the court below argued that the evidence found to have been destroyed had no materiality to the claim that was dismissed as punishment. The author of the court's opinion so found in her separate opinion. The majority opinion, by affirming without discussing the issue, necessarily decided that materiality is not a limit upon the punishing power of a court. Here we have a direct conflict between the holding of the instant case and those of the Ninth Circuit discussed above. Moreover, we have a disregard of the rulings of this Court. We respectfully urge that there should be further review by this Court.

B. The trial court in the instant case, in attempting to find relevant the materials that it found to have been destroyed, utilized this Court's then very recent decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983). In so doing, the trial court stretched this Court's ruling far from its holding and, indeed, applied it in a manner that this Court had disavowed.

In *Bob Jones*, this Court upheld a Revenue Ruling by the federal Internal Revenue Service, the agency that was charged with interpreting the Internal Revenue Code in accordance with express authority granted and long recognized by Congress. This Court went to great lengths to point out the consistent policies of both the legislative and executive branches that were represented in that Revenue Ruling. The contrast with the instant case is highly instructive.

This Court made clear in *Bob Jones* that the IRS (and, by clear implication, a state level trial court) does not have authority to promulgate its personal definition of what it might consider to be fundamental national public policy. Rather, this Court laid down specific guidelines to be applied before revoking tax-exempt status under the "fundamental public policy" rationale. All of the following facts, this Court held, must exist:

> (1) There must be an express and clearly defined national "fundamental public policy";
>
> (2) There must be "no doubt" as to the nature and existence of that national fundamental public policy;
>
> (3) There can be no doubt or ambiguity that the purposes and policy of the taxpayer violate that national fundamental public policy.

The IRS action under review in *Bob Jones* was based upon Revenue Ruling 71-447. 461 U.S. at 574, n. 3. That Revenue Ruling expressly applied only to a "racially discriminatory policy as to students" in private educational institutions. Id. In *Bob Jones*, this Court looked only to the propriety of that Revenue Ruling. This Court addressed no factual basis for revocation other than racial discrimination in education.

Moreover, this Court went to great lengths to limit its decision to racial discrimination in education and recounted in detail how this Court, Congress, and the Executive Branch all had found racial discrimination in education undeniably antithetical to the fundamental public policy of the nation. As this Court concluded:

> Few social or political issues in our history have been more vigorously debated and more extensively ven-

> tilated than the issue of racial discrimination, particularly in education.

461 U.S. at 595.

Indeed, this Court expressly refused to hold that there are any grounds other than racial discrimination by private schools that may be a basis for denying tax-exempt status. 461 U.S. at 596 n. 21. This Court noted further that it would be a misreading of its opinion to conclude that it considered the IRS authorized to decide which public policies are so fundamental as to require denial of tax exemption. 461 U.S. at 598, n. 23.

The contrast with the instant case is stark. Here the public policy was declared by a single state-level trial judge. There was no regulation or ruling by the executive agency charged with administering the statutory scheme involved. No evidence of broad adherence to the policy stated as addressed. There was no more than a single trial judge speaking his individual views on public policy.

Further, this Court in *Bob Jones* expended considerable effort to restrict its holding so that there should be no attempt by the IRS or by any court to expand that holding beyond its facts unless there is "no doubt" that the organization's purposes violated a "fundamental public policy":

> We emphasize, however, that these sensitive determinations [of "charitable" status] should be made only where there is *no doubt* that the *organization's* activities violate *fundamental* public policy.

461 U.S. at 598.

Thus, at the very least, the trial court, if it were to apply *Bob Jones* properly, was required to find that

the allegations regarding Synanon's organizational activities or purposes were conceived to violate a "fundamental public policy" as to which there was "no doubt." That did not occur here.

Had the trial court engaged in the proper analysis, it would have necessarily concluded that the allegedly destroyed materials did not relate to any "fundamental public policy" as to which there is "no doubt." Turning to each of the subjects referred to by the lower court: There is no fundamental public policy which would deny tax exemption to an organization because some of its members engaged in or discussed violence. There is no fundamental public policy against making money. There is no fundamental public policy against the purchase of guns; indeed, the Second Amendment indicates a public policy to the contrary. As to "legal terror tactics," the phrase is inherently ambiguous, and it is impossible to ascertain what public policy, if any, is related to this subject. As to "Holy War," which referred in large part to peaceful demonstrations, leafleting, and related activities, clearly the First Amendment protects these activities and no fundamental public policy is contrary thereto. And as to "Changing Partners" and "Love Match," there is certainly no fundamental public policy against divorce, remarriage and religious marriage ceremonies. The trial court's application of the *Bob Jones* decision to these topics was entirely erroneous.

Moreover, the findings of the trial court only involved *discussions* of these topics, not direct evidence of any such activities. The trial court's position that such discussions are somehow contrary to fundamental public policy is contrary to the First Amendment. In *National Association for the Advancement of Col-*

ored People v. Claiborne Hardware Co., 458 U.S. 886 (1982), this Court held that civil liability may not constitutionally be imposed upon an organization for the mere speech of its officers, even if that speech includes the advocacy of violence. In direct conflict with *Claiborne*, the trial court's reasoning in the present case imposed an extreme penalty based upon speech—not actions—allegedly made by individuals in Synanon.

In sum, the trial court in the instant case erred in stretching *Bob Jones* to something it is not. Tax exemption can be denied or revoked only where there is *no doubt* that the taxpayer was organized and acted pursuant to a policy contrary to a fundamental public policy clearly articulated by all three branches of government. The trial court in its holding has justified the fears of those who warn that *Bob Jones* will propel the IRS (and, if the lower court's decision is not overturned, state trial judges) into "a wide variety of situations demanding the most sensitive of determinations in areas of law outside the agency's [or court's] areas of expertise." See *The Revocation of Tax Exemptions and Tax Deductions for Donations to 501(c)(3) Organizations on Statutory and Constitutional Grounds*, 30 UCLA L. Rev. 156, 174, n. 118-20 (1982).

Whatever else it may be, Synanon is also a community highly successful in rehabilitating addicts, alcoholics, juvenile delinquents and other disabled and disaffected individuals. Moreover, the purposes of Synanon have been judicially determined as serving an important public policy. *Beauchene v. Synanon Foundation, Inc.*, 88 Cal.App.3d 342, 151 Cal.Rptr 796 (1979). The trial court in this case never decided,

let alone heard, any evidence of Synanon's charitable corporate purposes.

The instant case presents a clear contrast with *Bob Jones*. Whereas in *Bob Jones* evidence of the corporate purpose of the schools involved played a significant role, here the issue was not even explored. Whereas in *Bob Jones* there was an extensive exploration of the action of the legislative, executive, and judicial branches establishing the fundamental public policy, here there was none. Whereas in *Bob Jones* there was under review the ruling of the agency charged with administering the statute in point, here there was no ruling and, indeed, the relevant agency played no role whatsoever; it was the single trial judge alone. Here the executive and legislative branches played no role; there was no more than a declaration by a single trial judge. The dangers in such power, which the trial judge believed that he had received from this Court's *Bob Jones* decision, are readily apparent.

Moreover, the materiality of the trial court's line of reasoning is not apparent. Synanon contracted to buy the Boston House. Whether or not it was nonprofit is totally immaterial. Certainly, Bernstein, the seller, was not a nonprofit organization. Synanon's status or lack of status as a nonprofit organization went to its ability to use the property for offices, not to its ability to purchase the property.

This well illustrates the slippery slope against which the due process limitations upon sanctions is designed to protect. There is no doubt that the trial judge was very unhappy at Synanon. But the wrongdoing found of Synanon had nothing to do with its contract claim. It was totally irrelevant to whether Synanon could

buy the Boston House. It was totally irrelevant to whether Bernstein and Kabler defrauded Synanon by representing that the Boston House could be used as offices while knowing that the floor-load capacity made that impossible.

Indeed, here we have the two parties contracting for the sale of a horse, the buyer paying for a horse, and the seller delivering a mule. Because the seller is perceived as "bad"—i.e., because he may have engaged in violence and he may have believed in or even practiced unconventional sexual practices—he is not to receive his money back or damages; the seller may keep his windfall without as much as a trial. That truly is this case. It is a violation of due process and requires this Court's intervention.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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April 1986

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 83-1372

SYNANON FOUNDATION, INC., APPELLANT,

v.

STUART A. BERNSTEIN, SAMUEL J. KUSHNER,
JAMES H. KABLER III, and
COLDWELL BANKER AND COMPANY, INC., APPELLEES.

Appeal from the Superior Court
of the District of Columbia

(Hon. Leonard Braman, Motions Judge)

(Argued February 6, 1985 Decided January 29, 1986)

Sherman L. Cohn, with whom *Geoffrey P. Gitner* and *William F. Krebs*, were on the brief, for appellant.

William Daniel Sullivan, with whom *Warren K. Kaplan* was on the brief, for appellees Bernstein and Kushner.

John R. Cope, with whom *Anne N. Foreman* was on the brief, for appellee Coldwell Banker and Company, Inc.

James H. Kabler III, pro se.

Before NEBEKER, MACK and BELSON, *Associate Judges*.

Opinion for the court by *Associate Judge* MACK.

Separate statement by *Associate Judge* MACK at p. 21.

MACK, *Associate Judge*: This is an appeal from an order of the trial court dismissing plaintiff-appellant's complaint. The trial court found that dismissal of the complaint was warranted on two independent grounds: first, that the plaintiff had abused the discovery process; and second, that the plaintiff had perpetrated a fraud upon the court. We affirm on the second ground without deciding the merit of the first.

I

Factual Summary

Any written opinion in this case requires a laboriously detailed statement of the facts. The next fourteen and one-half pages recite such detail.

In summary, Synanon sought to buy an apartment building in the Washington D.C. for office and residential purposes. Through its officers and attorneys, it represented itself as a peaceful, nonprofit organization. An initial deposit of $250,000 was made and Synanon moved in pending settlement. Zoning difficulties surfaced; disputes arose between Synanon and the sellers and Synanon and other tenants. Unfavorable publicity thereafter exposed Synanon as anything but a peaceful entity. Both parties claimed each other in default under the purchasing agreement and Synanon sued for breach of contract and warranty. Answers and counterclaims were filed. When discovery proceeded, Synanon officers and attorneys perjured themselves in an attempt to secure favorable discovery rulings, at the same time destroying many corporate records. The sellers moved to dismiss and Judge Leonard Braman, after an eleven-day evidentiary hearing dismissed Synanon's complaint on the grounds of fraud on the court and abuse of the discovery process.

II

The Facts, In Detail

Plaintiff-appellant Synanon Foundation, Inc. [Synanon], was registered in 1958 as a tax-exempt, nonprofit organization under the laws of the State of California, for the avowed purpose of rehabilitating drug and alcohol abusers and engaging in research, public education, and charitable distribution. On April 18, 1978, Edward Siegel, the President of Synanon, approached defendant-appellee Coldwell Banker & Co., a real estate brokerage house, in regard to the possible purchase of a building in the District of Columbia that would be suitable for use both as Synanon's national headquarters and executive offices, and as a residence for Synanon members and residents. A sales agent for Coldwell Banker, appellee James Kabler III, had obtained a sales listing in December of 1977 from appellee Stuart Bernstein for an apartment building known as the "Boston House," located at 1711 Massachusetts Avenue, N.W. Kabler recommended the Boston House to Siegel because that part of the building that faces Massachusetts Avenue is in an area zoned "Special Purpose" [S-P], and at that time nonprofit organizations were permitted to maintain offices in S-P zoned locations as a matter of right. Kabler did not tell Siegel, however, that earlier that month, Coldwell Banker had received an inquiry from another potential purchaser interested in using the Boston House for office space. That individual had requested that Jeffrey Grene, another Coldwell Banker agent, determine the floor-load capacity of the building, since under the D.C. Building Code, a building that is zoned for offices may not be so used unless the floor-load capacity is 100 pounds per square foot on the first floor, and at least 60 pounds per square feet on the higher floors. Grene asked Kabler to determine the floor-load capacity of the Boston House, and Kabler asked

Bernstein. When Bernstein could not locate the information, Grene called a D.C. building inspector, who looked at the original plans for the building and informed Grene that the floor-load capacity of the building as designed was only 40 pounds per square foot for the upper floors and 70 pounds per square foot for the lobby, and therefore, based on the original plans, the building was unsuitable for office use. Grene told Kabler that the potential purchaser was not interested in the building because the floor-load capacity was insufficient for his needs. Kabler, however, did not raise this potential problem with the Synanon representative, who made his inquiry one week later.

On April 21, Siegel, Kabler and Bernstein met to discuss Synanon's interest in the Boston House. Siegel characterized Synanon as a peaceful, charitable organization, but stated that it had recently received unfavorable publicity from the news media. Siegel did not reveal the details of this publicity: a December 1977 article in Time magazine, and a television report by KGO-TV in January 1978, both alleging that Synanon had strayed from its founding principles, and had been transformed by its founder, Charles Dederich, into a violent cult. Bernstein did not ask for any additional information, and said that he sympathized with Siegel because he knew that the press could often be unfair in its coverage. He also refused Siegel's offer of references, requesting only a financial statement. Bernstein told Siegel that the zoning regulations permitted the use of the Boston House as offices by a nonprofit organization, and Kabler did not qualify that statement.

Three days later, Siegel met with Kabler, Bernstein, and Bernstein's attorney to discuss the terms of a purchase of the Boston House. Siegel once again mentioned

media criticism of Synanon and difficulties it had had with zoning authorities in California. Bernstein's attorney called the D.C. zoning office during this meeting to confirm that part of the Boston House was zoned SP, and then stated to Siegel that at least part of the building could be used for offices. Kabler once again did not qualify this statement. Bernstein instructed his attorney to draw up an Agreement of Sale, which the parties executed on April 28.

The Agreement provided that Synanon would purchase the Boston House for $5,600,000. Closing was deferred until January 1979 in order to provide a tax advantage for Bernstein. Synanon gave Bernstein a down payment of $250,000, and was given permission to occupy the top two floors of the building pending settlement. By section 6(a) of the Agreement, Bernstein was given the right to retain the deposit in the event of Synanon's default. On the question of Synanon's intended use, section 5 of the Agreement provided: "Seller and Purchaser recognize that it is the Purchaser's intention to acquire the Building for the purpose of converting it into Purchaser's headquarters . . . ." Section 3(f) of the Agreement states that part of the building was zoned to permit office use by nonprofit organizations. The Agreement did not explicitly recognize that a certificate of occupancy must be obtained prior to any non-residential use of building space in the District. *See* 11 DCMR § 3203.1 (1984). In order to obtain such a certificate, an applicant would be required to demonstrate that the floor-load capacity of the Boston House met the minimum requirements for office use under the Building Code. *See* 12 DCMR § 702.5 (1985). Although the Agreement did not specifically assign responsibility for obtaining the required certificate of occupancy for office use, Synanon contended in the trial court that this responsibility was Bernstein's under section 5(h) of

the Agreement, which provided that "any claims asserted by . . . governmental authority other than those based on the actions of Purchaser shall be the responsibility of Seller."

Synanon residents began to move into the apartment house during the last week in May. The Boston House Tenants' Association opposed the sale to Synanon, and together with an Advisory Neighborhood Council, it lobbied the D.C. Zoning Commission to change the zoning law in order to prohibit conversion of existing apartment units to offices without obtaining prior approval from the Board of Zoning Adjustment. On June 8, the Zoning Commission issued an emergency order, eliminating the zoning regulation that permitted the conversion of apartments to offices in SP zones as a matter of right, and providing that due to a housing shortage in the District, as an emergency measure all such conversions would require the review and approval of the Board of Zoning Adjustment. *See* 11 DCMR § 508.1 (1984). From June 12 through June 15, an evening TV news show ran a four-part series on the cult aspects of Synanon and its proclivity for violence. On June 15, Charles Dederich, Synanon's founder, became involved in an altercation with a Washington Post photographer outside the Boston House, and was subsequently charged, along with a second Synanon officer, with assault. During this period, according to Bernstein, he received complaints from Boston House tenants that Synanon had taken control of the front desk, that the organization was holding meetings in the lobby and early morning rallies in the courtyard, and that there had been unauthorized entries into some apartments.

On June 16, the Chief of Zoning Inspection notified Bernstein and Dederich that office use of the building would require a special exception under the June 8 emer-

gency order. Also on June 16, Bernstein, Kabler and Siegel met to discuss an upcoming meeting with the tenants' association. Kabler informed Siegel that one of the objections that the association was likely to raise at the meeting was the floor-load capacity of the building. Kabler informed Siegel, for the first time, that the floor-load capacity as listed in the plans for the building was insufficient for office use. At the meeting, the tenants did in fact raise this objection. Later in the day, Bernstein notified Synanon that he considered the tenants' allegations of harassment listed above to be a breach of the Agreement of Sale. One June 17 or 18, Synanon made the decision to move out.

On June 20, Bernstein sent notice to Synanon demanding that it cease its office use of the building until it obtained a certificate of occupancy. On June 21, Synanon hired a structural engineer to review the building plans, and also served a demand upon Bernstein that he obtain a certificate of occupancy and a special exception from the Board of Zoning Adjustment for office use of the building. On June 26, the structural engineer hired by Synanon reported that based on the building plans the Boston House could not be used for offices under the Building Code. On July 6, Bernstein purported to declare Synanon in default under the Agreement. On July 7, Synanon purported to rescind the contract based on Bernstein's failure to cure the various zoning problems in order to permit the building to be used for offices as contemplated by the Agreement of Sale.

Synanon subsequently filed the instant action in the Superior Court against the owners of the building, Bernstein and Samuel Kushner, and against the agent, Coldwell Banker, and its employee, Kabler. The complaint alleged fraud, breach of contract and breach of warranty,

and requested the court to order rescission of the Agreement, return of the $250,000 deposit, restitution for various expenses, and punitive damages. The owners and the agent each filed an answer, alleging that Synanon was forced to move out of the building not because the Boston House did not comply with the zoning requirements, but because of unfavorable publicity and because Charles Dederich wanted to escape prosecution for assault. Bernstein also filed a counterclaim. It initially alleged that Synanon was in default under various provisions of the Agreement that called for apartment and parking space rent payments, and in addition for lump sum payments of $5000 in lieu of rent for each of 35 apartments that had been vacated prior to settlement. Bernstein also requested damages for restoration costs, for legal fees, loss of future rents, and for "interference with Bernstein's prospective economic advantage" by causing him to lose tenants. On December 12, 1978—following additional publicity about Synanon's harassment of former members who left the organization, about its policy of violence and its threats against members of the media who published unfavorable reports about its activities—Bernstein filed an amended counterclaim, in which he alleged for the first time that Synanon had procured the Agreement of Sale by fraud, in that it had not disclosed to him that it was an organization committed to violence.

The defendants served their first discovery request, consisting of 54 interrogatories, on February 6, 1979. Nineteen of these interrogatories were directed to the issue of whether or not Synanon was a violent organization. (Interrogatories 32-50.) Four interrogatories requested tapes that had been broadcast over an in-house Synanon communication network, the "wire," transcripts of those tapes, and indices. Major sources of programming for the "wire" were the taped and live pronouncements of Charles

Dederich, Synanon's founder and leader. Dederich would hold morning meetings called "Think Tables," in which he would often spell out new directions for the organization. "Think Table" discussions were taped, and written summaries were created of the topics discussed. Synanon maintained an archive of 10,000 tapes, some of which were transcribed. It also employed an archivist, Steve Simon, who supervised the creation of a computerized subject matter index to existing transcripts of tapes, referencing the tape number for easy listening access. The index also included some untranscribed tapes. The subject matter index was not an index of "wire" broadcasts; the only way to identify the material broadcast over the Synanon "wire" was to examine daily broadcasting logs kept by the organization. As yet unaware of the existence of a subject matter index for all transcripts and some tapes at the time that the first set of interrogatories was filed, the defendants requested Synanon to identify all indices of tapes of Charles Dederich or Edward Siegel that were broadcast over the wire, or indices of transcripts of tapes of Dederich or Siegel broadcast over the wire, for the period January 1, 1977, through July 30, 1978. (Interrogatory 53.) In responding to this interrogatory, the defendants said that no index of wire broadcasts existed. The three other interrogatories requesting tapes and transcripts were as follows: In interrogatory 28, the defendants requested Synanon to identify all tapes or transcripts of wire broadcasts that referred to the period in May and June of 1978 when Synanon was in residence at the Boston House. In interrogatory 32, Synanon was asked to identify all documents, tapes, and transcripts of tapes referring to Bill and Sylvia Crawford, former Synanon residents who allegedly were harassed by Synanon after they left the organization. In interrogatory 34, the defendants asked Synanon to iden-

tify all tapes and transcripts of wire broadcasts including any discussion of Charles Dederich's policy on vasectomies for male Synanon residents.

Synanon responded to some of the interrogatories. It refused to answer the questions directed to the issue of violence or the question on the "vasectomy policy," on the ground that those interrogatories were not likely to lead to the discovery of admissible evidence. In addition, it stated that it would be unduly burdensome for it to identify material contained in tapes in the Synanon archives. The defendants filed a motion to compel answers, and on January 18, 1980, Judge William S. Thompson began a hearing on the motion. At the hearing, Dan L. Garrett, Jr., then general counsel for Synanon, sought to be admitted pro hac vice in order to argue against the motion to compel. Judge Thompson declined to grant this request on the ground that Garrett was potentially a witness in the case. Nevertheless, Garrett sat at counsel table, and through counsel represented that no index, summary or referencing of tapes in the Synanon archives had ever been accomplished. Garrett's position was that it would be unduly burdensome to require Synanon to respond to the interrogatories requesting it to identify tapes on certain subjects, because someone would have to listen to all the tapes in the archives in order to comply. The defendants produced an affidavit that had been filed in another case, in which Garrett's son had stated that Synanon employed Steve Simon specifically to index and reference the tapes. Garrett's counsel represented to the court that Garrett would be "willing to state under oath or as an officer of the court or in any capacity that such indices do not exist." When counsel for defendants asked to put Garrett on the stand in order to cross-examine him about the existence of an index, Synanon's counsel ob-

jected, telling the court that cross-examination would be "gratuitous."

Judge Thompson agreed, and relying partly on Garrett's representations as an officer of the court, he limited the scope of defendants' interrogatories to delete any requirement that Synanon identify particular tapes covering any substantial period of time. He limited interrogatory 28, compelling Synanon to provide only tapes of wire broadcasts made during June or July 1978. He eliminated the request for tapes of Dederich's statements on vasectomies, ordering the identification only of existing tape transcripts and indices referring to the subject. He similarly narrowed interrogatory 53 to eliminate the requirement that tapes be identified, ordering Synanon to identify only indices of tapes or transcripts of tapes of wire broadcasts by Charles Dederich or Ed Siegel from January 1, 1977 through July 30, 1978. Finally, Judge Thompson required Synanon to respond to interrogatories 47 through 50 to the extent of identifying any indices and paper documents referring to former Synanon residents threatened or beaten by the organization. Judge Thompson's January 23, 1980, order compelling answers to interrogatories is the only existing order compelling discovery ever entered in this litigation.[1]

In February 1980, Dan Garrett left Synanon, and was replaced as general counsel by Phillip Bourdette. Bourdette was subsequently admitted pro hac vice and was among counsel of record for Synanon in the trial court. On February 29, 1980, Synanon filed supplemental answers to the interrogatories in response to Judge Thompson's order. In regard to interrogatories 47 through 50—

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[1] Although Judge Fauntleroy also granted a motion to compel later in the litigation, he later vacated that order. *See infra.*

requesting documents referring to former Synanon residents who were harassed by the organization—Synanon's supplemental response was minimal. In regard to interrogatory 28 (which required Synanon to provide all wire broadcast tapes for June and July, 1978 that referred to Synanon's departure from the Boston House), and to interrogatory 53 (which required Synanon to identify all indices of tapes or tape transcripts of broadcasts by Dederich or Siegel from 1977-78), Synanon referred the defendants to the programming log for wire broadcasts, and stated that no index or abstract showing the content of any broadcasts existed. In a subsequent request for production of documents, filed April 16, 1980, the defendants identified and requested 103 potentially relevant tapes from the wire log that were broadcast in June and July 1978. Synanon ultimately produced four of these. The defendants also requested approximately 400 other tapes in which violence or money-making activities of Synanon were discussed. A small number of these tapes was produced. Defendants requested tapes or transcripts of tapes of telephone conversations to the Boston House from June 15 through June 19, 1978, and Synanon provided a limited response. Defendants also requested a tape of a phone conversation on June 17 between Dan Garrett and Synanon's attorney, and a tape of a wire broadcast on June 23, 1978, both of which defendants said they could not locate.

On June 19, 1980, the defendants filed a motion for sanctions based on Synanon's incomplete response to the document production requests. On May 7, 1981, following a hearing, Judge John D. Fauntleroy ordered Synanon to produce all of these documents and tapes within 90 days. Synanon moved for reconsideration of this order, and requested an evidentiary hearing on the question of whether any of the identified tapes existed. On October 3,

1981, Synanon's general counsel, and counsel of record in the case, Phillip Bourdette, filed an affidavit with Judge Fauntleroy stating that he had personally supervised a search of the Synanon archives and could find no additional material responsive to the document production request. At hearings in November 1981 and April 1982, Steven Simon, the Synanon archivist, stated that Synanon tapes were routinely "recycled," and that although none of the requested tapes now existed, they had not been deliberately destroyed. Based on this testimony, on April 26, 1982, Judge Fauntleroy vacated his order of May 7, 1981 compelling production of documents.

Defendants subsequently filed a second motion for sanctions, which was denied by Judge Carlisle E. Pratt on June 25, 1982. On February 8, 1983, the case was assigned to Judge Leonard Braman. In July 1983, defendants obtained information that Synanon, with the active participation of its in-house legal staff—including Dan Garrett and Phillip Bourdette—had engaged in a massive scheme, in anticipation of and in response to discovery requests in this case and in several others, to delete incriminating information from tapes in the Synanon archives and to burn or hide other tapes that could not successfully be "doctored." Defendants also discovered the existence of the subject-matter index, and were informed that Steve Simon, Synanon's archivist, had supervised a project at the direction of the Synanon legal department to eliminate incriminating topic headings so as to make access to the remaining tapes more difficult. Defendants obtained this information from affidavits by two former Synanon residents who had witnessed and participated in the destruction, Bette Fleishman and George Farnsworth.[2] Based on these affidavits, the defendants filed a

[2] These affidavits were submitted by the United States in an action by Synanon filed in the United States District Court

motion to dismiss Synanon's complaint. Defendants alleged that dismissal of the complaint was warranted as a sanction for Synanon's willful abuse of discovery under Super. Ct. Civ. R. 37. Defendants also argued that the participation by Synanon's legal counsel, Garrett and Bourdette, in the destruction of tapes and documents, and their attempts to mislead Judges Thompson and Fauntleroy, had worked a fraud upon the court that independently warranted dismissal of the action.

Judge Leonard Braman held an eleven-day evidentiary hearing on the motion to dismiss. Farnsworth testified, and defendants presented a videotape of Fleishman. According to their testimony, in October of 1978, Dan Garrett and Steve Simon and another Synanon resident spent two weeks in a trailer listening to tapes. Simon told Fleishman that incriminating tapes were destroyed during that period. In November, 1978, tapes were flown out of the Synanon archives to a different location where they were burned at Steven Simon's direction. In December, more tapes were destroyed. Also in that month, Phillip Bourdette ordered all tape recordings and tape summaries distributed throughout Synanon to be turned over to the legal department. In response to this order, Farnsworth testified, he collected tapes and his wife gave them to Bourdette. In March of 1979—immediately following the filing of defendants' first set of interrogatories—Steve Simon approached Farnsworth, who was in charge of the archive computer system. That system contained the transcript subject matter index (organized by key word) and a tape inventory that could identify all tapes by title

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for the District of Columbia. In that action, Synanon requested, and was denied, a declaratory judgment that the Internal Revenue Service had improperly revoked its tax-exempt status. *See Synanon Church v. United States*, 579 F. Supp. 967 (D.D.C. 1984).

or date. Simon told Farnsworth that the indices were dangerous and needed to be purged. Simon also told him that he had the approval of the legal department for this project. Farnsworth provided Simon with a complete printout of indices by title, date and subject matter. Simon marked those entries on the printout for which he wanted Farnsworth to delete the corresponding data file. Farnsworth deleted key words from the subject lists and tape numbers from the tape inventory. He burned all evidence of deletion. Farnsworth revealed that the computer tape inventory, that was presented to Judge Fauntleroy in connection with Simon's testimony that led to a vacation of that court's previous order compelling production of documents (*see* p. 13 *supra*) was an intentionally changed inventory from which entire tapes had been deleted at Simon's direction.

In April of 1979, Farnsworth approached Bourdette in order to attempt to confirm that his deletion at Simon's order of parts of the transcript index and tape inventory was legal. Bourdette said that he knew what Simon was doing and that Simon was not acting on his own. Bourdette explained that the goal of the deletion project was to make it difficult for people with whom Synanon was involved in litigation to zero in on relevant transcripts, and maintained that Farnsworth's actions were legal as long as the particular items deleted had not yet been requested in litigation.

On September 5, 1979, Farnsworth was present at a dinner meeting between Steve Simon and Dan Garrett where the progress of the erasure project was discussed. During September, Farnsworth deleted more references, and in January of 1980, he deleted an additional batch of topics. He estimated that he had deleted a total of 180 topic references.

Despite the fact that, on January 18, 1980, Dan Garrett had represented to Judge Thompson that the only way to identify tapes relating to specific topics was to listen to each tape in the archive, Bette Fleishman testified (in the evidentiary hearing before Judge Braman) that in February of 1980 she was recruited to work in the archives deleting and erasing tapes on Simon's instructions. She stated that Simon received information from Bourdette concerning materials sought in various lawsuits in which Synanon was involved. Simon in turn gave Fleishman a "sensitive subject" list, and she prepared logs of matters appearing on the list and delivered them to Simon. Simon, together with Bourdette's wife and another Synanon attorney, then determined which material to destroy. Once the material was identified, Fleishman would burn the tape label and the topic log and erase the tapes. Other tapes were relabeled in order to avoid subpoenas and document requests in a number of different cases. Simon told Fleishman that he and Bourdette had agreed that Simon would have to lie in various proceedings. By the Summer of 1980, the indices were adjusted and the tape references corresponding to the topic index were erased. Fleishman estimated that more than 100 tapes were erased. During this period, Simon told Fleishman that he had perjured himself when he stated at his deposition that tapes were routinely recycled and that no tapes had been destroyed. In this regard Farnsworth testified before Judge Braman that to his knowledge no tapes were ever reused.

Very little direct contradiction of the testimony of Farnsworth and Fleishman was presented by Synanon in the hearing before Judge Braman, since on key points Phillip Bourdette invoked his Fifth Amendment privilege, and other witnesses presented by Synanon had no direct knowledge of the erasure project.

Judge Braman found Farnsworth and Fleishman credible. Based on their testimony, Judge Braman held that Synanon's destruction of materials requested by the defendants through the discovery process warranted dismissal of the complaint. He found that the materials destroyed, among others, related to "violence, money, purchase of guns, legal terror tactics, Holy War, changing partners or love match." This material, Judge Braman held, was relevant to the complaint because it bore on Synanon's "nonprofit" status.

The trial court in addition held that Synanon's in-house attorneys had perpetrated a fraud on the court of sufficient magnitude to warrant dismissal of the complaint. This appeal followed.

III

We find ample evidence in the record to support Judge Braman's conclusion that the involvement of the Synanon executives and attorneys in the fraud, their subornation of perjury and their own false statements to Judge Thompson and Fauntleroy constituted a fraud on the court, warranting dismissal of the complaint.

The record in this case demonstrates "the most egregious conduct" by an officer of the court, including "the perpetration of fraud" and "a corruption of the judicial process itself." *Lockwood v. Bowles*, 46 F.R.D. 625, 632 (D.D.C. 1969). The evidence presented to Judge Braman shows the existence of an " 'unconscionable plan or scheme' " by counsel of record, Phillip Bourdette, and another lawyer for Synanon, Dan Garrett, " 'designed to improperly influence the court in its decision.' " *Id.* at 631 (citation omitted). There is no question that counsel for Synanon attempted to perpetrate a fraud upon at least two trial judges, with the intent of preventing " 'the

judicial machinery [from] perform[ing] in the usual manner its impartial task of adjudging cases that are presented for adjudication.'" *Id.* (citation omitted). The involvement of an officer of the court in "a carefully planned scheme calculated to deceive the court" is the type of misconduct that warrants dismissal of the complaint. *Southerland v. County of Oakland*, 77 F.R.D. 727, 733 (E.D. Mich. 1978) (fraudulent statements to court by attorney, an officer of the court, justify vacation of judgment), *aff'd*, 628 F.2d 978 (6th Cir. 1980).

In the hearing before Judge Thompson, Synanon's first general counsel, Dan Garrett, asked that he be admitted pro hac vice in order to argue—falsely—that the defendants' requests for the identification of tapes in the Synanon archives on specific topics were unreasonable because Synanon had no means of determining the content of those tapes other than by listening to them. When Judge Thompson refused to admit Garrett pro hac vice, Garrett offered to testify under oath that the Synanon archivist had not indexed, summarized or cross-referenced any of the tapes, a demonstrably false assertion. Judge Thompson relied on Garrett's representation as an attorney, and did not find it necessary to permit the defendants to cross-examine him on this statement. Based in substantial part on Garrett's statement, Judge Thompson narrowed the scope of defendants' first set of interrogatories considerably.

Similarly relying on the representations of Phillip Bourdette, counsel of record for Synanon in this case, Judge Fauntleroy vacated a prior order compelling Synanon to produce documents in response to the defendants' first request for production of documents. Bourdette filed an affidavit stating that he had conducted a "diligent" search and could find no documents responsive to

the court's order. Although Bourdette may have been technically correct at the time he filed his affidavit that no responsive documents could be found, the reason this would have been so is Bourdette's sponsorship and supervision of a massive program to destroy damaging and incriminating information contained in the Synanon archives. The purpose of Bourdette's disingenuous representation, as well as Garrett's false statements to Judge Thompson, was as Judge Braman found, to deceive the court, and to improperly influence the court in its decision on the defendants' motions to compel, with the ultimate aim of preventing the judicial process from operating in an impartial fashion. These actions by Synanon's counsel warrant dismissal of the complaint. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246-47 (1944) (attorney tampering with administration of justice requires vacation of judgment, whether or not behavior actually influenced outcome of trial); *id.* at 251 (Roberts, J., dissenting) ("No fraud is more odious than an attempt to subvert the administration of justice."); *Great Coastal Express, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 675 F.2d 1349, 1357 (4th Cir. 1982) ("Involvement of an attorney, as an officer of the court, in a scheme to suborn perjury would certainly be considered fraud on the court."), *cert. denied*, 459 U.S. 1128 (1983); *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976) ("Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court."); 7 MOORE'S FEDERAL PRACTICE § 60.33, at 359 (2d ed. 1985) (Attorney's loyalty to client "obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard

in the conduct of a case he perpetrates a fraud upon the court.")

Counsel for Synanon argues that the Superior Court Civil Rules only contemplate vacation of an already entered judgment as a remedy for fraud on the court, and do not provide for dismissal of an action prior to trial on this basis. Super. Ct. Civ. R. 60(b). Rule 60(b), however, does not subsume or abrogate the court's "inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice." *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 589 (9th Cir. 1983). *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 630, 632 (1962) (federal Rule 41(b) does not abrogate court's inherent power to dismiss action based on counsel's failure to comply with rules of court). The claim of "fraud on the court" is similar in effect to the equitable defense of unclean hands. In an action in equity, " 'he who asks relief must have acted in good faith. The equitable powers of th[e] court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make th[e] court the abetter of iniquity.' " *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933) (citation omitted). Such a party "must keep his hands clean throughout the litigation," or his action will be subject to dismissal. *American Insurance Co. v. Scheufler*, 129 F.2d 143, 148 (8th Cir.), *cert. denied*, 317 U.S. 687 (1942). Thus, while " 'equity does not demand that its suitors shall have led blameless lives,' . . . it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue." *Mas v. Coca-Cola Co.*, 163 F.2d 505, 509 (4th Cir. 1947) (citation omitted). A plaintiff's non-compliance with this requirement warrants dismissal of his action.

In sum, the participation by Synanon's high officials and counsel, in successful attempts to deceive the court and to influence its decisions, was conduct which the administration of justice cannot tolerate. Indeed counsel's behavior was "such a violation of a lawyer's duty to the court—a duty imposed not alone by principles of honesty and good morals but also by a code of ethics adopted as rules of court[—] as to amount to a fraud on the court for which equity will grant relief." [3] *Sutter v. Easterly*, 354 Mo. 282, ——, 189 S.W.2d 284, 287 (1945) (cited in *Lockwood v. Bowles*, *supra*, 46 F.R.D. at 632 n.31). The decision of the trial court dismissing the complaint based on this conduct is therefore

Affirmed.[4]

Separate statement by *Associate Judge* MACK: The majority chooses not to reach the major question decided by the trial court—its decision to grant the defendants' motion to dismiss the complaint based on Synanon's destruction of evidence. I do not think we can ignore the trial court's holding in this respect; 42 pages of its 45-page oral opinion are addressed primarily to Synanon's conduct in destroying evidence and the relevance of that conduct to the issue of whether there has been discovery abuse in

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[3] The Clerk of this court is directed to forward a copy of this opinion to the Bar Counsel of the District of Columbia and to disciplinary authorities of other appropriate jurisdictions.

[4] Still pending before this division, and awaiting the conclusion of all proceedings in the instant appeal, is the Appeal No. 84-1635 from the November 9, 1985 Order of Judge Braman awarding attorneys' fees and expenses of litigation in the amount of $585,852.80 in favor of defendants and counterclaimants.

this contractual dispute. The diligence of the trial court in marshalling these facts commands respect. And while the court's deep concern is understandable in view of the depravity connoted by this record, I believe that Synanon —putting to one side the "fraud on the court" issue—was otherwise entitled to a hearing on its legal contractual claims and a fair review of the denial of that hearing on appeal. One may forfeit the right to use our judicial system because of abuse relevant to such use; one does not forfeit that right because of bad character or conduct irrelevant thereto. I would therefore look to the trial court's dismissal of the complaint on the grounds that there had been an abuse of the discovery process.

The trial court found by clear and convincing evidence that the willful destruction and alteration of materials by Synanon during the discovery process warranted dismissal. Thus, it found that subject matter categories deleted from Synanon's computer index included "violence, money, purchase of guns, legal terror tactics, Holy War, changing partners or love match." The court further found that the tapes on these subjects were relevant to the complaint (and therefore the defendants were prejudiced by their nonproduction), noting:

> [Their relevance] has to do with Synanon's status. That is, whether during the material times involved in this case, Synanon was a non-profit corporation. If it was not a non-profit corporation, then it would not, under the applicable zoning laws which applied at the time, be permitted to use the subject property for office purposes, as well as residential purposes[, s]ince the zoning was predicated on the non-profit status of the organization in question . . . . [W]hether Synanon was a non-profit corporation

> turned upon whether its corporate policy contravened fundamental public law policy. . . . The [] issue having to do with Synanon's status applies to all the parties defendant since it inheres in the complaint. That is, it is an issue which is inextricably involved in the entitlement of Synanon to recover. . . . [V]iolence was an issue in this case and was implicated as an issue by the complaint . . . . Also, guns, siphoning of money, changing partners are issues, at least arguably for the purposes of motivating destruction.

The trial court thus found that the nonproduction of these materials "probably would have had a dispositive bearing upon Synanon's complaint, that is, its nonprofit status." It went on to find that no sanction other than dismissal would be appropriate here, because "[o]ne of the issues in this case is whether high management of Synanon directed or condoned violence or other activities which contravened fundamental public law policy." Dederich's pronouncements on tape, the court found, were the "best evidence of this policy," and for this reason, no sanction other than dismissal could cure the prejudice to the defendants from the destruction of this evidence.

It is indisputable that Synanon willfully destroyed a substantial number of tapes and other materials that had been requested by the defendants in discovery. However, it does not necessarily follow from the fact that material requested by the defendants was subsequently found to have been destroyed, that the defendants were actually prejudiced by its nonproduction. In evaluating whether dismissal of a complaint is warranted as a sanction for willful failure to comply with a court order compelling

discovery under Super. Ct. Civ. R. 37,[5] the trial court must "evaluate the prejudice to the moving party" by its failure to obtain the requested materials, and must also

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[5] Super. Ct. Civ. R. 37 is the exclusive route by which a trial court may impose sanctions for failure to comply with a court order compelling discovery. The court may not resort to other rules to justify such sanctions, nor may it dismiss based on discovery abuse under any other rubric ("unclean hands," for example) using its "inherent" powers. *Societe International v. Rogers*, 357 U.S. 197, 207 (1958). Normally, sanctions may be imposed under Rule 37 "only upon failure to comply with an order of the court." *Henneke v. Sommer*, 431 A.2d 6, 8 (D.C. 1981). If a party's responses to discovery requests are incomplete or evasive, it is incumbent upon the opposing litigant to request the court to resolve the outstanding questions by order. It is an abuse of discretion to impose a weighty sanction upon a litigant for failure to respond fully to discovery requests absent an outstanding court order directing compliance. *Id.* at 9. Compare Rule 37(d). I note that the only court order in this litigation compelling discovery was Judge Thompson's order of January 23, 1980, compelling answers to several interrogatories. At issue are Synanon's supplemental responses to Interrogatories 28, 47-50, and 53. Interrogatories 28 and 53 required Synanon to identify tapes of wire broadcasts made by Dederich or Siegel from January 1, 1977, through July 30, 1978, and to identify wire broadcasts in June and July, 1978. Synanon partially complied with these interrogatories by providing broadcasting for the period in question. Synanon's answers to interrogatories 47 through 50, requesting information on former residents of Synanon who had been threatened, were incomplete. Synanon also failed to identify its subject matter index and tape inventory in response to these interrogatories. Under our cases, the trial court was authorized to impose sanctions only for this evidence of non-compliance with the January 23, 1980, order. The evidentiary hearing held by Judge Braman was not limited to an assessment of the information withheld under this order, however, but was much broader in scope, encompassing the fate of all materials requested by defendants during the course of this litigation. After hearing this evidence, the trial court's dismissal order did not focus on

"consider alternative, less harmful sanctions" than dismissal, which is "the most draconian sanction" that may be imposed. *Shimer v. Edwards*, 482 A.2d 399, 400-01 (D.C. 1984); *see Massengale v. 3M Business Products Sales, Inc.*, No. 84-342 (D.C. Dec. 30, 1985); *Vernell v. Gould*, 495 A.2d 306, 311 (D.C. 1985). I do not believe that the findings prerequisite to dismissal based on discovery abuse have been demonstrated in this case.

I

The Relevance of Nonprofit Status

It is apparent from even the most cursory reading of Judge Braman's opinion that the basis for his dismissal of the complaint as a sanction for discovery abuse under Rule 37 was his belief that material relevant to Synanon's nonprofit status had been destroyed or withheld, and that the defendants were prejudiced by Synanon's actions because Synanon's "nonprofit status is inextricably involved in the entitlement of Synanon to recover."

Synanon's failure to comply with the January 23rd order, but instead seemed to accord mere discovery requests the force of court orders. I recognize, however, that Judge Thompson's order compelling discovery was more limited than it might otherwise have been because he relied on false representations by counsel for Synanon as to the difficulty of accessing the tape archives. Similarly, Judge Fauntleroy vacated his 1981 order requiring Synanon to produce every document and tape requested in the defendants' First Request for Production of Documents based on the false representations of Synanon's archivist and of Phillip Bourdette, Synanon's general counsel and counsel of record in this case. For purposes of my analysis of Judge Braman's dismissal on Rule 37 grounds, therefore, I assume without deciding that all of the tapes and documents requested in the defendants' first set of interrogatories and document production requests were constructively subject to a court order.

In my view the trial court was in error in concluding that Synanon's nonprofit status was in issue, that as a matter of law Synanon had forfeited that status, that its nonprofit status was relevant to the complaint or the defense, and that such status would have a dispositive bearing on Synanon's right to recover.

The court did not parse out the basis for its conclusion that Synanon's nonprofit status was a key issue. The complaint asked for a rescission of a contract because of fraudulent misrepresentations by the defendants. The defendants did not raise Synanon's status as a defense to the action in their answer to the complaint; this issue was first raised in the court's pretrial order, where it stated that although the pleadings did not set forth Synanon's status as a question to be adjudicated, that status was fairly put into issue by the defendants' discovery requests and therefore would be an issue at trial.

I do not see the relevance of Synanon's nonprofit status to the issues raised by the dismissed complaint. I see no nexus between Synanon's relatively uncomplicated action for rescission of the Boston House contract based on fraudulent misrepresentations by the defendants, and the question of whether Synanon is a violent organization. Since I do not find Synanon's violence to be relevant to the complaint or the defenses asserted in the answers, I cannot see how the defendants could have been prejudiced by Synanon's destruction of tapes that revealed the organization's, and its founder's, true nature. Similarly, since the commercial activity and deviant sexual practices of the organization are irrelevant to the issues raised by the complaint, their nonproduction worked no prejudice to to the defendants' case. *See Pollock v. Brown*, 395 A.2d 50, 52 (D.C. 1978). Of the hundreds of tapes requested by the defendants—many of which apparently

were destroyed—only a relatively small number were likely to lead to the discovery of admissible evidence on any issue framed by the complaint and the answers. Yet it is only the categories of tapes and corresponding subject matter topics on the transcript index relating to violence, sex, and commercial activity that were specifically found by the trial court to have been destroyed or erased. The record does not reveal the extent to which any relevant tapes were erased or disguised. Similarly, the record does not reveal whether there were topics relevant to the case in the subject matter index, and whether those topics were eliminated. For example, we do not know whether there was a "Boston House" or even a "Washington" topic. The testimony of Farnsworth and Fleishman indicates that most of the topic headings and corresponding tape excerpts that were deleted were relevant to the questions of violence, deviant practices, and money. The scheme actually was instituted in response to a case filed against Dederich in 1978, in which Synanon's propensity for violence was the key issue. We may of course assume that tapes relevant to the present case were destroyed in the massive effort to destroy incriminating information that had been requested through discovery in the many different cases in which Synanon was involved. Since the trial court, however, placed such heavy emphasis upon the relevance of Synanon's nonprofit status in determining the prejudice to the defendants by the nonproduction of material relevant to that status, I do not believe that we could find a proper exercise of discretion in the trial court's evaluation of the sanction to impose in this case.[6] *See Shimer v. Edwards*, *supra*, 482

[6] Although Synanon's violence is relevant to Bernstein's amended counterclaim based on his allegation that Synanon represented itself as a peaceful and nonviolent organization, the court's sanction was not directed to the counterclaim,

A.2d at 401; *Vernell v. Gould, supra*, 495 A.2d at 311; *Braxton v. Howard University*, 472 A.2d 1363, 1365 (D.C. 1984); *Ungar Motors v. Abdemoulaie*, 463 A.2d 686, 688-89 (D.C. 1983).

II

The Defining of Nonprofit Status; The Incidents Following Therefrom

The trial court, in concluding that Synanon's status was inextricably bound up with its right to recover, did not identify the nature or scope of any inquiry into that status. We may safely presume that a trial judge on the District of Columbia Superior Court has no authority to evaluate or revoke a grant of non-profit status by the State of California. Upon principles of comity, organizations registered as non-profits under California law and

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which remains pending in the trial court. It is noteworthy that the record is replete with evidence that Synanon's goals and means are violent. It is unnecessary to remind counsel that the objective of the pretrial discovery rules is to allow a party to obtain all of the facts relevant to a claim or defense. By the time this case came before Judge Braman there was ample evidence in the public record that Synanon was not a peaceful organization. The trial courts should be on guard to prevent a party from employing the discovery rules with the long-range objective of trapping his opponent into the imposition of the most severe sanction, dismissal. Moreover, where destroyed materials are not relevant to the issues framed by the complaint and the answers, I believe that an appropriate response to a finding that a party was prejudiced in the presentation of his counterclaim by the destruction of materials would be to take all facts to which the discovery was relevant as established, *see* Super. Ct. Civ. R. 37(b)(2)(A); *Black v. Sheraton Corp. of Am.*, 371 F. Supp. 97, 102 (D.D.C. 1974), or to enter a default judgment on the countercliam, Super. Ct. Civ. R. 37(b)(2)(C), rather than to dismiss the complaint.

the laws of other states are permitted to do business as nonprofit organizations in the District of Columbia. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1, 13 (1878). In order "to bring such corporations under the supervision and the regulation of public officials charged with such responsibility to the end that the public may have the same information respecting their background and financial standing[,] character and [] management which is demanded of domestic corporations," *Hill-Lanham, Inc. v. Lightview Development Corp.*, 163 F. Supp. 475, 476 (D.D.C. 1957), foreign corporations are required to obtain a certificate of authority from the Mayor of the District of Columbia before they may do any business in this city. *See* D.C. Code § 29-565(a) (1981).[7] *See also Federal Loose Leaf Corp. v. Woodhouse Stationery Co.*, 163 F. Supp. 482, 483 (D.D.C. 1958). Since Synanon is a nonprofit corporation under California law, it is entitled to operate as a nonprofit organization in the District of Columbia if it obtains such a certificate.[8] Once the certificate is procured,

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[7] That section provides:

> A foreign corporation to which this chapter is applicable shall procure a certificate of authority from the Mayor before it conducts affairs in the District, but no foreign corporation shall be entitled to procure a certificate of authority under this chapter to conduct in the District any affairs which a corporation organized under this chapter is not permitted to conduct. A foreign corporation shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of the District, and nothing in this chapter contained shall be construed to authorze the District to regulate the organization or the internal affairs of such corporation.

[8] By purchasing the Boston House for use as its executive headquarters, Synanon was doing sufficient business in the

the foreign corporation shall "enjoy the same rights and privileges as . . . a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued." D.C. Code § 29-566(b). By statute, the Mayor is given exclusive authority over both the grant and the revocation of certificates of authority, *see id.* § 29-570(b) (grant); *id.* § 29-580 (revocation); *id.* § 29-594(b) ("The Mayor shall be charged with the administration and enforcement of this chapter.") The Mayor may refuse to grant, or may grant and then revoke, a certificate of authority if the nonprofit corporation desires or attempts to conduct affairs in the District that a District nonprofit corporation would not be permitted to conduct. *Id.* § 29-565(a). If the Mayor declines to grant, or grants and then revokes, a certificate of authority for a foreign corporation, that corporation has a right of appeal to the courts. *Id.* § 29-595. All civil and criminal actions to enforce the certificate of authority requirements are committed to the jurisdiction of the D.C. government. *Id.* § 29-599.7.[9]

District to require a certificate of authority. *See Ferguson Contracting Co. v. Coal & Coke Ry. Co.*, 33 App. D.C. 159, 170 (1909). *See also* 17 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 8486 (R. Eickhoff & R. Klaus ed. 1977).

[9] Since the task of regulating foreign nonprofit corporations and of determining when such corporations will be permitted to operate in the District of Columbia is delegated by statute to the Mayor, it cannot be argued that the zoning authorities in the District have the power to determine whether a foreign corporation is or is not a nonprofit organization for purposes of the zoning law. Although the zoning regulations contain a definition of "nonprofit organization," *see* 11 DCMR § 199 (1984), that definition must be viewed as a guideline for non-corporate organizations which, unlike Synanon, are not registered with any state authority as nonprofit in nature. For it cannot be argued that the Board of

Even if Synanon had not obtained a certificate of authority from the Mayor, its status as a registered California nonprofit corporation permits it to enter into enforceable contracts in the District of Columbia. District of Columbia law expressly preserves the validity of contracts of foreign nonprofit corporations even if they have failed to obtain the required certificate of authority. D.C. Code § 29-583(b) ("The failure of a foreign corporation to obtain a certificate of authority to conduct affairs in the District shall not impair the validity of any contract or act of such corporation . . . ."). *See Federal Loose Leaf Corp. v. Woodhouse Stationery Co., supra*, 163 F. Supp. at 483.[10]

Unfortunately, none of the parties to this appeal has considered the application to this case of the certificate of authority requirement. There is thus no proof in the record that Synanon obtained a certificate of authority

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Zoning Adjustment is empowered to independently review the actions of a corporation that is registered under the laws of a state as a nonprofit organization and is seeking to establish an office in an S-P zoned area, in order to determine whether it is truly non-profit in character. The Board has neither the resources nor the expertise to conduct such an inquiry. The issuance of a certificate of authority by the Mayor permitting a foreign corporation to transact business in the District of Columbia must be conclusive upon the Zoning Board in its evaluation of a proposed use that is permitted only to a nonprofit corporation under the zoning regulations.

[10] *See also Fritts v. Palmer*, 132 U.S. 282, 289-90 (1889):

> If the legislature had intended to declare that no title should pass under a conveyance to a foreign corporation purchasing real estate before it acquires the right to engage in business in the State, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been clearly manifested.

from the District of Columbia. The trial court in its pretrial order, mentions that Synanon has qualified as a nonprofit organization under the law of the District of Columbia. Assuming that it has done so, it is within the purview of the Mayor and the D.C. government to revoke this grant of authority to act as a nonprofit corporation in the District. "[N]o citizen of a State can enjoin a foreign corporation from pursuing its business. Until the State acts in its sovereign capacity, individual citizens cannot complain. The State must determine for itself when the public good requires that its [] assent to the admission shall be withdrawn." *Pensacola Telegraph Co. v. Western Union Telegraph Co., supra*, 96 U.S. at 13.

Even if Synanon has not obtained a certificate of authority, however, I still could not find any relevance of Synanon's nonprofit status to the complaint. In evaluating state statutes designed to regulate the activities of foreign corporations, the Supreme Court has held that unless the statute expressly declares void all contracts entered into by foreign corporations without obtaining a certificate of authority, or creates a private right of action in favor of those who do business with the foreign corporation—allowing those parties to enforce the statute through private civil suits—these types of provisions will not be read into the statute and enforcement will lie exclusively with the state government. *Seymour v. Slide & Spur Gold Mines*, 153 U.S. 523, 525 (1894); *Fritts v. Palmer*, 132 U.S. 282, 289-93 (1889); *Cowell v. Colorado Springs Co.*, 100 U.S. 55, 60-61 (1879); *Pensacola Telegraph Co. v. Western Union Telegraph Co., supra*, 96 U.S. at 13.[11] *See also Groo v. Norman & Robinson*, 42

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[11] *See also Federal Loose Leaf Corp. v. Woodhouse Stationery Co., supra*, 163 F. Supp. at 483 (purpose of certificate of authoirty requirement in the District is not " 'to put into

App. D.C. 387, 390 (1914) ("The modern rule, from which we have been unable to find any substantial departure, is that the title of a [foreign] corporation to real estate held in excess of its powers [under the law of the state] is good until invalidated in a direct proceeding instituted by the soverign . . . .").

The D.C. Code does not create a private right of action in favor of parties with whom a foreign corporation contracts, to permit such parties to obtain a declaration that the contract is void based on the corporation's failure to comply with statutory requirements. The statute does create a limited defense that may be raised by such parties, however, when the corporation sues on its contract without first obtaining the requisite certificate. The Code provides that Synanon would not be permitted to "maintain any action" in "any court of the District" without first obtaining a certificate of authority. D.C. Code § 29-583(a). This section has been interpreted to require a court to stay an action by a foreign corporation that sues on a contract without obtaining the certificate—in order to give that corporation an opportunity to comply with the statutory provisions—*once the issue of the corporation's status has been raised by the defendant. York & York Construction Co. v. Alexander*, 296 F.2d 710, 713-14 (D.C. 1972); *Hill-Lanham, Inc. v. Lightview Development Corp., supra*, 163 F. Supp. at 476; *Federal Loose Leaf Corp.*

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the hands of those[] with whom [foreign corporations] may contract . . . a weapon of substantial defense, which might in conceivable cases amount to immunity from liability; but its aim is rather to bring foreign corporations under the supervision and regulation of state officials' " [citation omitted]); *Hill-Lanham, Inc. v. Lightview Dev. Corp., supra*, 163 F. Supp. at 476 (same).

v. Woodhouse Stationery Co., supra, 163 F. Supp. at 483. However, "[u]nless an objection to a party's capacity to sue or defend is properly raised in the trial court, the issue is deemed waived throughout the proceedings." 18 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 8629 (R. Eickhoff & R. Klaus ed. 1977).

Here, no objection to Synanon's maintenance of the instant suit on the ground that it could not sue on its contract because it had not obtained a certificate of authority was ever raised by the defendants. Even if it could be said that by focusing discovery on the question of Synanon's nonprofit status, the defendants constructively raised the question of the certificate of authority (assuming that no such certificate had ever been issued by the Mayor), the defendants' failure to raise this question in their answer or at some earlier stage of the proceedings constitutes a waiver of the issue. *Id.* § 8628 and cases cited.[12] Thus, the defendants would have been permitted to raise the for-profit status of Synanon as a defense to the complaint only if Synanon had not obtained a certificate of authority and if they had raised this issue early in the proceedings. The defendants have not made a showing that either requirement was satisfied, however.

Whether a trial court has authority independent of the procedural requirements set forth in the statute to preclude a foreign nonprofit corporation from enjoying benefits accruing to nonprofit organizations in the District of Columbia need not be decided here. For even if the trial court in the course of this litigation had adjudicated Synanon a "for-profit" corporation, and thus not entitled

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[12] That section provides, in part: "The defense that a foreign corporation is doing business in the state without qualifying is waived unless it is pleaded by the defendant at an early stage of the proceedings."

to "nonprofit organization" status under the zoning regulations, that decision as to status could not be applied retroactively to void Synanon's contract with Bernstein. The fact that Synanon intended to use the Boston House for a purpose permitted only to nonprofit organizations under the zoning regulations does not in any sense transform its contract with Bernstein into one that is for an illegal purpose and therefore unenforceable. The basis of Synanon's bargain with Bernstein is the prospect of dual residential-office use of the Boston House, and the purchase price of the building reflects that understanding. Even if Synanon ultimately were to be adjudicated a for-profit organization, it would still be permitted to use the building for residential purposes, or it could lease or sell the building to an entity that would be allowed to maintain a business within it under the zoning laws.

Defendants apparently believe that based on the materials withheld by Synanon, the trial court would have held that Synanon may not be recognized as a nonprofit organization in the District of Columbia, and then the court could have applied this holding retroactively to the Boston House contract, making Synanon's contemplated use of that building illegal under the zoning law. Even if this reasoning process had merit, the defendants' post hoc allegation of illegality based on Synanon's status is not a defense to this action. For "it is settled that illegality constitutes no defense when merely collateral to the cause of action sued on" or when "the relation of the illegality to the relief sought is indirect and remote." *Loughran v. Loughran*, 292 U.S. 216, 228 (1934).[13]

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[13] In *Loughran*, the Supreme Court considered an argument by a party defendant that recovery under a complaint should be forbidden where the plaintiff's status granted by another jurisdiction would not have been obtainable in the forum

III

Relevance in the Absence of a Nonprofit Issue

Finally, defendants argue that even if Synanon's nonprofit status was not at issue, the trial court properly exercised its discretion to dismiss based on the fact that the destroyed material was relevant to the defense raised to the complaint. I see no merit to this argument. The defendants argued in their answer that Synanon left the Boston House because it had received unfavorable publicity, because its leader had been involved in an altercation with a member of the news media outside the Boston House, and because it was not getting along with the Boston House tenants. It is farfetched to argue that Charles Dederich's opinions on vasectomies and on sex partners as expressed in his "Think Table" tapes—along with the great majority of material requested by defendants through discovery—has any bearing whatsoever on this defense. Moreover, as noted, the trial court's stated reason for dismissing the action was not that evidence relevant to this defense had been destroyed, but that the destroyed evidence was relevant to Synanon's nonprofit status—an issue that "inheres in the complaint [and] is inextricably involved in the entitlement of Synanon to recover."

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state, and the relief requested by the plaintiff could only be obtainable if its status was recognized by the forum. The defendant argued that the Constitution's full faith and credit clause does not require the courts of a given jurisdiction to recognize a public act or record of another jurisdiction which is contrary to the public policy of the State of the forum. The Court held that since the alleged illegality related only to the "status" of the plaintiff it was therefore collateral to the issues in the case, and the defendant was not permitted to raise or take advantage of the defense of illegality. As the *Loughran* Court noted, "[e]quity does not demand that its suitors shall have led blameless lives." *Id.* at 229.

IV

Conclusion

The trial court's dismissal of the complaint under Super. Ct. Civ. R. 37 was based almost entirely upon the destruction of materials relevant solely to Synanon's non-profit status. Without findings of fact by the trial court that are focused on the question of the extent of the destruction of *relevant* material, I cannot find that the court properly exercised its discretion in dismissing the complaint on the basis of discovery abuse.

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

Civil Action No. 7189-78

SYNANON FOUNDATION, INC.
v.
STUART A. BERNSTEIN, *et al*

Washington, D.C.
Wednesday, October 12, 1983

The above-entitled matter came on for hearing before the Honorable LEONARD BRAMAN, Retired Judge, in Courtroom No. 36, commencing at approximately 9:00 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER ORIGINAL NOTES AND RECORDS OF THE TESTIMONY AND PROCEEDINGS IN THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Plaintiff:

GEOFFREY GITNER, Esquire
PHILIP BOURDETTE, Esquire

On behalf of Defendants:

WARREN KAPLAN, Esquire
DANIEL SULLIVAN, Esquire
JOHN R. COPE, Esquire
ANNE FORMAN, Esquire
T. BURNS, Esquire
C. JOHNSON, Esquire

PROCEEDINGS

MR. GITNER: Good morning, Your Honor.

THE COURT: Good morning.

THE DEPUTY CLERK: Your Honor, the Court recalls the matter of Synanon Foundation versus Stuart A. Bernstein, et al., Civil Action Number 7189-78.

THE COURT: This is the twelfth and final day of our hearing on the defendants' motions to dismiss. There are two preliminary matters.

Following the last day, the last session, the plaintiff, Synanon, filed a motion for leave to file explanatory material. There having been no objection to the motion, it will be granted. Mr. Clerk, would you please distribute copies of the order?

The defendants, on yesterday, defendants Bernstein and Kushner filed a motion for leave to file explanatory materials. Since there is not a feasible opportunity to respond to the motion, that motion will be denied.

MR. KAPLAN: Your Honor, may I—

THE COURT: And an order will be issued in due course.

MR. KAPLAN: Your Honor, that motion was filed last Friday and hand delivered last Friday, and delivered to Mr. Gitner.

THE COURT: I received it yesterday, Mr. Kaplan. In any event, I will deny the motion for the reason that I've stated.

I come now to the decision in this case. I will state my decision and I will further state the reasons which constrain me to reach the conclusion.

For ten days, beginning on September 12, 1983, the Court took evidence on identical motions to dismiss which

charge the plaintiffs, Synanon Foundation, with first destroying evidence and discovery materials, and then covering this up by perjury, and the commission of a fraud upon the Court.

I have heard eleven witnesses, and have received 78 exhibits into evidence with approximately an equal number of sub-exhibits.

In reaching my decision, I have carefully considered the credibility of the witnesses, including their demeanor as they presented themselves before the Court.

I have further considered their motivations and their possible biases, their opportunity to know the facts and the circumstances whereof they testified.

I have further considered the quality of their testimony and whether they were primary or secondary witnesses. By that I mean whether they were primary witnesses to an event in issue or whether they were peripheral witnesses or persons with respect to that event.

I have considered the exhibits and I have considered the pleadings.

Now in making my decision and explaining the reasons for it, I will follow the format of the hearing memorandum filed by Synanon with respect to the defendants' motion to dismiss. That hearing memorandum was filed on September 20, 1983. I will use this as my format, not because I necessarily agree with the substances of the law as stated therein, but because I find it a useful analytical tool, and the first issue which I will address is whether there was an actual destruction or alteration of evidence or discoverable materials.

Now the subject matter which is claimed to have been destroyed principally involves tapes and computer data. The reason which is claimed to have caused the destruction is said to be the felt opinion or fear of Synanon that the

materials would impact adversely to Synanon on two issues.

The first issue has to do with Synanon's status. That is whether, during the material times involved in this case, Synanon was a non-profit corporation. If it was not a non-profit corporation, then it would not, under the applicable zoning laws which applied at the time, be permitted to use the subject property for office purposes, as well as residential purposes. Since the zoning was predicated on the non-profit status of the organization in question. This is set out on pages two and three and five and six of the pretrial order of August 9, 1983, and whether Synanon was a non-profit corporation turned upon whether its corporate policy contravened fundamental public law policy.

This is the law as stated by the Supreme Court in its last term in Bob Jones University against the United States, reported at 103 Supreme Court 2017. In the context of this case, the claimed illegality of Synanon's corporate policy involved its resort to violence, that is, that as a matter of corporate policy, it availed itself of terror and violence.

It is further claimed that Synanon was not a non-profit corporation because the corporate monies were deflected to private usages as a matter of corporate policy, and it was further claimed that as a matter of policy again, Synanon's posture, corporate posture, contravened fundamental policies having to do with the state of marriage and with sexual practices.

The first issue having to do with Synanon's status applies to all the parties defendants since it inheres in the complaint. That is, it is an issue which is inextricably involved in the entitlement of Synanon to recover.

The materials also potentially impacted upon the counterclaim filed by the defendants Bernstein and Kushner, which among other things, claimed that Synanon, through

its representatives, had made certain representations involving the peaceful, passive nature of the organization, which representations are claimed to have been false and fraudulent.

In resolving those two issues, the expressions of the high echelons of Synanon are important. Those expressions would speak for policy. Especially important would be the expressions of Charles Dederich, who was the founder of Synanon, and through the years, its unchallenged leader.

Now there is a threshold issue which is being raised in this case. It was raised during the discovery phase and it was ventilated at the hearing on the motions to dismiss. That threshold issue arises from expressions made in the course of what are called Synanon Games or Think Tables or Morning Court activities. These expressions would take into account utterances made by Dederich and made by other officers of Synanon, as well as residents or members of Synanon. Were these so-called Games or Think Table sessions simply therapeutic techniques, as Synanon claims, for the release of emotions and/or ideas which bore no relationship to truth, or were they, as the defendants argue, techniques for the enunciation of truth as the speaker saw it, and for the promulgation of policy?

The issue has been approached by the parties in terms of mutual—mutually exclusive propositions, but I do not think that this is so. If I were required to reach a finding on this issue, I would find that these Games, so-called Games or Think Table sessions, were used for both purposes by Dederich and others. I will allude to a few examples of where the content was serious.

And the first example is the Morantz episode. Paul Morantz was an attorney who represented litigants in a litigation against Synanon. On October 11, I believe, 1978, an attempt was made to murder Morantz by placing a rattlesnake in his mailbox. Joseph Musico and Lance Kenton, Synanon residents, were arrested and charged for

attempted murder, and later, Dederich was also arrested and charged.

This felony was preceded by over a year by bitter denunciations and excoriations against the legal profession on the part of Dederich. For example, in the so-called New Religious Posture Think Table, he talked about breaking some lawyers' legs and if that was ineffective, breaking their wives' legs, and if that was not effective, cutting the kid's arm off, meaning the arm of the lawyer who was perceived to be an enemy of Synanon.

The substance of this is found on pages 12 and 13 of the transcript of the excerpt of the New Religious Posture Think Table, which is plaintiffs' five. The casette is defendants' 14, I believe, and also plaintiffs' three and four.

These denunciations against lawyers who oppose Synanon in general, were particularized with regard to Paul Morantz, and there were expressions, as I will state later, which urged and exhorted physical injury to Morantz. And this occurred on multiple occasions.

Synanon's witnesses, and particularly Mr. Akey, its president, its current president, stated that these utterances were examples only of Dederich's flamboyance, his penchant for hyperbole, which were not taken seriously. This argument is suggestive of the circumstances which led to the assassination of Thomas Beckett when Henry II, in exasperation, spoke in the presence of his barons, the thinly veiled exhotation, "Will no one rid me of this meddlesome priest?" whereupon several of them assassinated Beckett.

Dederich's reiterated incitements far exceeded Henry's words in wilfully instigating the felony. It is beyond coincidence that Musico, Kenton and Dederich entered pleas of nollo contendre, and while there is testimony that Dederich's plea was prompted solely by reasons of broken

health, that does not explain the other pleas nor does it meet the legal requirement which was imposed upon the Court that took the plea to satisfy itself that there was proof beyond a reasonable doubt that the Government could have made a prima facie case.

Utterances of this sort preceded the life-threatening attack on Ritter, a former Synanon resident, and in assessing whether Dederich's utterances against Morantz and others was serious, it is useful to look at the incident involving the so-called Dinuba punks, and also Cardino. The violence that was utilized there translated the policy of militancy against trespassers into action, and Dederich had spoken about militancy against trespassers and when the violence occurred, it was condoned and embraced by Dederich as being an altogether proper expression of his policy.

There is no reason which I can see for reaching a conclusion that the expressions of militancy against trespassers were serious and why the policy of militancy against attorneys was any less serious. there is no reason which I can see for that kind of selectivity. Also, the expressions with regard to changing partners, that obviously was serious, and we have that from the testimony of Messakian, who was on the verge of quitting Synanon because of the constraints of that policy, but she finally accepted it. Also showing the serious nature of these Games or Think Table Sessions are the expressions of Dederich in his deposition in the Times case. The transcript is defendants' 36 in evidence.

He stated, under oath, that he used these sessions as vehicles for the promulgation of policy, and he said the same on other occasions in public. But it is not necessary that I conclude that these Games or sessions were serious, deadly serious matters. It suffices that Synanon perceived that the tapes and like material might be harmful and that a jury might find that their content was deadly serious,

and therefore proceeded to destroy the materials and then cover up the destruction, and I find that this is so.

Now with respect to the alleged destruction, the destruction charged flows from the testimony of two principal witnesses, Fleishman and Farnsworth. The deposition of Kolb corroborates in certain respects the testimony. But the testimony of these three witnesses implicated specific persons and in the face of those personalized charges, Dr. Steven Simon, the Director of Archives, took the Fifth Amendment, and the same privilege was invoked on behalf of Miriam Bourdette, a paralegal in Synanon's legal department. Also by Daniel Sorkin, and also by Michele Albano Benjamin, who was assistant to the Chairman. Also, Philip Bourdette, Synanon's secretary and present general counsel availaed himself of his Fifth Amendment rights, as respects the testimony of Fleishman, and also partially with respect to Farnsworth's testimony.

Previously, the Fifth Amendment was invoked by Dan Garrett, who was prior chief counsel for Synanon, by Jade Dederich, Chairman of Synanon, and by Ron Cooke, a past vice president of Synanon. While these persons may be entitled to avail themselves of the Fifth Amendment, and I draw no adverse inference from the invocation of the privilege, the fact remains that there has been no refutation of the defendant's testimony from primary sources. Further, no testimony has been offered from the following persons who are uniquely under Synanon's control, and whose testimony would have been material. And that is David Benz, who was treasurer of Synanon, and who was alleged to have burned tapes. Terry Haberman did not testify, nor did Chris Haberman, who worked in the legal department and who was implicated in the destruction of tapes nor did Dorothy Garrett testify, who was a director of Synanon, and who was mentioned specifically as being knowledgeable by Farnsworth. David Benjamin, an attorney of Synanon did not appear, nor did Walter Lu-

belle. And finally, Charles Dederich did not testify, by deposition or otherwise.

The persons who were produced were, relatively speaking, secondary witnesses—Otto, Ross, even Messakian.

Just as in the case of the building of the ancient pyramids' inner chambers, it is quite likely that one group of workers was ignorant of what another group was accomplishing.

I find by clear and convincing evidence that there was a wilful destruction and alteration of materials, that this was accomplished under the aegis of Simon, and that the materials not only related to violence, but also to money, to sexual subjects, to guns, and to other matters. This destruction was set off by the attempted murder of Morantz on October 11, 1978. Later in the same month, after the arrest of Musico and Kenton, Dan Garrett flew to the Synanon facility in Badger, California, so-called Home Place. There he, Simon, Sorkin, Chris Haberman, adjourned to a trailer, and during a period of approximately two weeks, a substantial number of tapes were destroyed.

I find that in the main, those tapes involved violence.

The next month, on November 21, 1978, the Los Angeles police raided Home Place and among other things, seized a casette of the New Religious Posture Think Table which took place—that is, the Think Table took place on September 5, 1977. The raid was on November 21, 1978.

Following that, Simon and Dan Sorkin, who was a private pilot, flew several times with boxes of tapes. One time to Kerhunkson, New York, where a substantial number of boxes of tapes were left. Another time to Lake Havasu, where the tapes were stored in a rented basement. Later David Benz burned a number of tapes.

In December 1978, Dederich was arrested on the Morantz charges. Simon and Philip Bourdette proceeded to

gather up tapes, Think Table topic summaries and transcripts which were scattered over the various facilities of Synanon.

This was more or less the end of what I perceive to be the first wave of the destruction of materials. Then in late March—strike that. In March and April of 1979, Simon approached Farnsworth about the deletion of data from the computer's inventory and index of transcript and tape references. He did so with the knowledge and the approval of the legal department, and in about April of 1979, Farnsworth spoke with Bourdette and Bourdette evinced that he knew and approved of the project.

There's been testimony that Mr. Bourdette was occupied virtually the entire month in depositions and discovery in Los Angeles, and therefore, was not available for the claimed discussions with Farnsworth, but he was also at home—that is, at the same facility with Farnsworth, which I believe was Tomales Bay, on certain weekends.

I find as a fact that such conversations did take place.

In the summer of 1979, the destruction continued, the erasing of tapes in the face of discovery in this case, the ABC case, and in the Morantz case, which was, I believe, captioned Synanon Foundation against Meriwether, et al. Morantz had filed a cross complaint against Synanon in that case.

During the summer of 1979, Fleischman was working part time in the archives listening to and logging tapes. With her there were approximately 20 others working on the same project. The discovery in the three cases that I have mentioned was substantial, and thus the listening and logging project.

There is testimony from Fleishman that Albano, the assistant to the chairman, came in while Fleishman was working and stated in effect that it was a good thing that the erasing was going on. Soon after, Simon stated to

Fleishman, "God, she's stupid. I have to tell her to shut up."

The Court has found that this was admissible, and not hearsay. Though Albano's statements may, arguendo, be inadmissible, Simon's expressions are not, and the words of Albano are admissible as the format or in order to explain the content of Simon's expressions in the nature—which expressions were in the nature of presence—present sense impression, which is covered by Rule 803, subdivision 1 of the Federal Rules of Evidence.

That was followed in September, 1979 with Simon coming to Farnsworth for a second purge of the computer, the first one having been done in early April, 1979.

The third purge of the computer occurred in January, 1980, when Simon again approached Farnsworth with the third request, which Farnsworth executed. In February, 1980, through September—through—excuse me—summer of 1980, Farnsworth worked full time in the archives, engaged in a special and secret project for and with Simon in which tapes were erased and altered.

MR. KAPLAN: Excuse me, Your Honor. I don't mean to interrupt. I think you said Farnsworth. I think you meant Fleishman.

THE COURT: Yes. I meant Fleishman was working full time in archives on this project.

The erased tapes and altered tapes impacted upon this case, the ABC case and Morantz.

In the spring of 1980, Fleishman approached Ms. Bourdette, as she did on various occasions, to inquire whether a particular tape on violence should be erased in order to get Ms. Bourdette's guidance where the content of the tape was arguably of an incriminatory nature. And Ms. Fleishman testified that when she did see Ms. Bourdette in the spring of 1980 on such a mission, Ms. Bourdette responded, yes, the tape should be erased.

In July or August of 1980, there was the automobile trip in which Fleishman was a passenger with Ms. Bourdette, with one Ross and with Bernstein. During that trip, Ms. Bourdette admitted that she had been involved in the erasure of a substantial number of tapes in the three cases. Mr. Bernstein's testimony does leave gaps in it when he was asleep, and I believe also where he was discharged as a passenger before—before Fleishman and Ms. Bourdette separated.

This destruction, which I have found, was of an extensive nature, according to Fleishman. Over 100 tapes were erased and altered while she was involved in the project. Thirty—approximately thirty by her. These included Think Table sessions and the destruction of Think Table transcripts from 1977 and 1978. Also, Board of Directors' meetings, and also, Board of Director Games. Also, there was erased Synanon Games which Dederich participated in prior to 1977.

Farnsworth testified that a large amount of entries in the computer inventory and computer index involving transcript references were deleted. In late March and early April, 1979, he stated that 50 to 100 Think Table or Morning Court references were deleted and substantially more were deleted in the second and third purges of the computer in September, 1979 and January, 1980. This destruction of materials is corroborated by independent sources.

Firstly, Simon, in his deposition in the ABC case, which is defendants' 30, Roman Numeral I, testified on pages 108 and 109 that the subject matter index recorded the type of event involved and the facility location. This confirmed Farnsworth, who stated that the original format of the subject matter index, before it was altered, did have that information as part of the printout but the sanitized subject matter index, which is Court Exhibit 1, is without that information or data. the Farnsworth diagram of the

content of the subject matter index before the purging is set forth in defendants' 11 and 12 in evidence.

Another piece of corroborating evidence is that while Court Exhibit 1 has 9,143 entries, according to the report of Simon to the Board of Directors dated February 15, 1979, which is defendants' 32 in evidence, the Charles E. Dederich subject matter index had more than 20,000 entries. He called the index a monumental work of Sybil Schiff which stretched over a period of three years.

Thirdly, and further corroborating this destruction of materials is the chronological subject matter index, defendants' 33, which was never produced in any case, and this notwithstanding that Messakian admitted that the subject matter index was fairly called for in both the ABC and the Morantz cases. That chronological subject matter index shows gaps which are the vestiges of the deletions and those are set forth in defendants' 37, 38 and 39. They have not been sufficiently explained, in the opinion of the Court.

Further corroborating the destruction of materials is the Think Table excerpt of July 28, 1977, which is a sub-exhibit to the affidavit of Messakian. The affidavit of Messakian is plaintiffs' 16, and the sub-exhibit number is E-Roman Numeral II. This excerpt was Synanon's—was given by Synanon as a response to Morantz's request for production on October 19, 1979. It is labeled, and quote, CED on Morantz, unquote. Morantz, as I will further state, is one of the missing key words from the computer.

Though the exhibit was apparently typed at the legal department on April 16, 1979, it is listed on the list of transcripts which is the second part of Court Exhibit Number 1, and it is listed as tape number 770728 on page 048732 of that exhibit, therefore, in the view of the Court, the transcript could have been retyped at the legal department.

Now Synanon argues that defendants are obliged to identify with specificity the materials which were destroyed, but Strothers Patent Corporation against Nestle Company, Incorporated, reported at 558 Federal Supplement 747, upon which Synanon relies, only speaks of, "identification with as much specificity as possible of the documents which were destroyed." That is at page 756 of the Opinion.

Since the nature of the destroyed evidence and the extent of the destruction both determine the degree to which specificity of identification can be made, Strothers erects a variable standard, and that is, "as much specificity as possible."

Assuming arguendo that Strothers correctly states the law, a question which I need not decide, I find that this case sufficiently complies with Strothers. That conclusion is supported by the following:

One, 19 specific tapes listed in defendants' 35 were missing, not produced, including the original tape as distinguished from the casette, of the New Religious Posture.

I find that those missing tapes were destroyed. Each was requested in discovery here, and each is covered by a Think Table topic summary attached to the defendants' 35 in evidence, which summary gave a general and accurate description of the subject matters involved.

In the ordinary course of business, each Think Table topic summary was backed by a tape.

Secondly, three more tapes were missing involving 1978 sessions. One was—one was of March 13, 1978. Another on May 3, 1978. Another on October 19, 1978, the first dealing with corporal punishment, the second with presenting a tough image, and the third with Morantz being greeted by a rattlesnake. Those tapes were requested, but were missing, and I find, destroyed.

Third, three tapes were produced, but significant portions were erased, though those erased portions appear on a Think Table topic summary, the first being on August 17, 1977 dealing with guns and security, the second being August 27, 1977, dealing with physical force, and the third, October 3, 1977 dealing with the so-called Holy War. The last two are not on the computer inventory.

Fleishman testified that not only were entire tapes erased, but portions of tapes were erased, the remainder having been left on the tape.

Four, I find that specific tapes were demanded by the defendants April, 1980 request for production. Response was made in May of 1980. Items six, eight and thirteen embraced 59 specific tapes which were not produced, though Think Table topic summaries were extant. This included 17 on the Boston House, which is the real property that is the subject matter of this case.

On the same request, 300 specific tapes, whose existence is shown by their appearance on the wire program log, defendants' 19, were requested and not produced. This includes—this request includes 99 wire broadcasts from the Boston House.

Synanon argues that the absence of these tapes was established in the ABC case long before the defendants here requested those tapes, and that the defendants seek only to exploit that which had been previously demonstrated to be missing. But this argument doesn't alter the fact of wilful destruction of tapes which I find to have occurred. Nor does it prove that the defendants would not have called for these materials in the ordinary course of discovery. If there is any doubt as to whether they would have been called upon, that doubt should be resolved against the wrongdoer, who should not profit by the unresolved questions that are the aftermath of the wrong conduct.

Five, by way of the specific materials which were destroyed, the December 23, 1977 tape, the so-called Battle Cry tape, that tape is not on the Dederich inventory, the printout, which is exhibit 1 of defendants' 8, though a transcript of the Battle Cry is available as plaintiffs' 10 in evidence.

Six, after Formia, on August 28, 1978, there was a Think Table session. Dederich participated. As was the policy of Synanon to tape all of the Think Table sessions of Dederich, and although the policy was not 100 percent successful, in the vast majority of cases, they were taped—virtually all. As I have stated, the August 28, 1978 Think Table session was taped. It was taped by Fleishman in part, and according to her testimony, the taping was further done--she was helped, that is, by Irving Goldman, a Synanon resident, who was not brought to this hearing to testify contrary to Fleishman.

The contents of this session was also heard by Kolb, and is part of the transcript of his testimony which has been admitted into evidence in this case. During this session, Dederich exhorted the doing of injury upon Morantz, and he chided the Synanon resident by the name of Tickles for not proceeding to effectuate Dederich's wishes.

I find that in the ordinary course, it would have been the policy to preserve a tape of this session, but Dan Garrett, who was then general counsel for Synanon, ordered Fleishman to give up the tape and to put it on his desk, which she did. I find that the tape was destroyed.

Later, on September 1, 1978, there was a Board of Directors' Game. Fleishman heard this. The existence of this Game, it seems to me, was virtually admitted by Mr. Akey, and virtually admitted that it was taped. Here again, Dederich directs the injury or Morantz and Ritter. That tape was destroyed.

There are not Formia tapes, although Farnsworth testified that on July 22, 1978, he taped a session.

I have catalogued specific instances of tapes which were destroyed and altered, but it seems to me that subject matter categories would be sufficient to satisfy Strothers requirement of specificity. The categories were delineated by Fleishman. Among others, they included violence, money, purchase of guns, legal terror tactics, Holy War, changing partners or love match. These subject matters were not destroyed in toto, but as Fleishman testified, the destruction was astutely refined to accommodate the practicalities which confronted Synanon, including the fact that Dederich had made certain public pronouncements on the same subject.

I say that identification by subject matter is sufficient in the context of this case and, as a matter of policy, Synanon should not be heard to claim that there is insufficient specificity, since it was the instrument, the very instrument of the destruction.

So much for the issue of whether there was a destruction of materials. Next I turn to whether or not there is a connection between the destroyed documents and the issues of this case, whether there is a nexus.

Fleishman's testimony establishes an explicit connection between the destruction, the subsequent cover up, and three cases—this case, the ABC case and the Morantz case. When working with Simon on a discovery request in the course of which tapes were erased, Simon would mention the case that was involved, and the trilogy of cases were recurrent.

Further, Ms. Bourdette stated to Fleishman that the erasures related to the three cases.

Fleishman's epi—excuse me. Fleishman's estimate of approximately 100 destroyed tapes during her employment with archives in 1980 was explicitly tied to the same trilogy of cases and in the summer of 1980, Simon stated to Fleishman that he had testified falsely when he gave tes-

timony recently in Washington. He had, as a matter of fact, given a deposition in this case in March, 1980, and at that time, this case was the only piece of litigation that Synanon was involved in in the District of Columbia.

Lest there be any misunderstanding, I do not rest my finding on this issue of the motion on Farns—excuse me—on Fleishman's testimony at pages 529 to 530 of her transcript that some of the erased tapes involved discussions of the Boston House, including Dederich's assaulting a reporter and removing himself from this country with knowledge that an arrest warrant had issued for him. I do not make such a finding because Fleishman later testified that destruction could have happened as distinguished from her testifying earlier that it had happened. But the connection between the destruction in the case at bar is implicit by subject matter, as well as explicit.

As I have stated and found previously, violence was an issue in this case and was implicated as an issue by the complaint and by the counterclaim. Also, guns, siphoning of money, changing partners are issues, at least arguably for the purposes of motivating destruction. Further, destruction of materials in the ABC case probably impacted in this case. The issues were overlapping in the two cases, and it was merely a question of timing of discovery as to which litigant made the first request.

What was destroyed in ABC or Morantz was rendered unavailable for the instant case, and if there be doubt whether the defendants would have gotten at this discovery independently, it would be unthinkable of the Court—for the Court to resolve that doubt in favor or the wrongdoer who perpetrates the absence of the evidence.

Next I turn to the question, was there a duty to preserve the documents in question. There is a duty to preserve not only documents that are presently requested, but also documents which are likely to be requested. That was admitted in the course of this hearing. Where the

momentum of the litigation indicates that the discovery path will turn sooner or later to a class of materials, those materials may not be tampered with, and should not be with impunity.

The cases cited by Synanon in the hearing memorandum which it filed on September 20, 1983 support this proposition.

The Allen Penn case, on page 27 of the memo. The Boman Instrument case, on pages two and three of the memo, and Strothers, on pages five and six of the memo, all support this duty. In this case, suit was filed by Synanon on July 11, 1978, and the counterclaim was filed on December 15, 1978. The defendants' first interrogatories were propounded on February 6, 1979, the same month as Morantz propounded discovery in the Meriwether case. The first interrogatories by the defendants in this case opened up the matter of tapes, transcripts and indices and brought those subject matters within the zone of discovery. Even if the discovery did not target precisely the materials involved, they were within the zone which had been fairly demarcated.

I conclude that there was a duty to preserve these materials.

Next I turn to the issue of whether there are other sources of information or evidence which can do service for the destroyed materials. Most of the destroyed tapes were tapes in which Dederich was involved. A substantial number of them also involved Board of Director activities, either in formal session or in so-called games. One of the issues in this case is whether high management of Synanon directed or condoned violence or other activities which contravened fundamental public law policy.

As the defendants have argued, the tapes contained the actual voices of the protagonists. They uniquely recorded the quality of the voice and the ambience of the situation which prevailed. They would help show whether the ac-

tivity was merely graming or whether the parties were bent upon deadly seriouss business. The tapes undoubtedly would be the best evidemce.

Reconstruction by testimony—that is, taking the testimony of the auditors would not be an equivalent. As a matter of fact, it has been tried but those efforts have been met by invocations of the Fifth Amendment.

This case is disttinguishable from the Allen Penn case upon which Synancon relies on this issue of the case. That is, whether there iis other serviceable evidence.

In Allen Penn, the destroyed materials did not prove up the element off the case. The element there involved was whether injury had occurred. Instead, the destroyed materials pointed to discovery from third parties and those third parties were still available to give testimony. Here the destroyed tapees were the ultimate evidence. To use the vernacular, they were the jackpot and it was the jackpot which was desstroyed.

The computer daata which was destroyed would have led in house to the taapes. It would not be a situation like Allen—like Allen Penn, where the computer data merely pointed to third pparties outside the litigants. Here the computer data would have pointed to in house tapes. But Synanon argues that it offered to open up the tape library so that the defendiants could listen to all the tapes. That argument, of coursse, does not reach the proposition that tapes were destroyyed. And further, the offer was an offer to open up a search for the proverbial needle in the haystack. Dan Garrett told Judge Thompson in the January, 1980 hearing that it would take—it would take a couple of years to listen to all the tapes, and the defendants were welcome to do thatt, and there was no way of abbreviating that search.

Thirdly, the offeer to open up the complete library would have entailed an eenterprise that would have been impossibly expensive and it was sure to receive a rejection.

The subject matter index would have helped in the search, however, Synanon first destroyed part of it and then obfuscated the existence on the emasculated index.

About this subject matter index, the tape library included approximately 4,000 tapes. For the purposes of this case, the heart of the library was Charles Dederich at the Think Table or the Morning Court. These activities commenced in 1977 and went through April, 1978, but there were also Games prior to 1977 in which Dederich participated.

Synanon's policy was to tape all of Dederich's activities at the Think Table or other exercise, and as a matter of fact, virtually all of his expressions at such sessions were taped. Sybil Schiff transcribed virtually all of Dederich's expressions at Think Table or Morning Court sessions. Her transcripts were detailed and accurate. As Simon stated in the exhibit which the Court previously referred to, she had labored over three years on this project. For each transcript there was a tape. These materials were transposed to the computerized index by Sybil Schiff and by Farnsworth. Additionally, some tapes without transcripts were placed on the index. Apparently these did not number more than 25. The index was separate and distinct from the straight printout. The straight printout was like a table of contents and is exemplified by defendants' 8 for evidence, exhibit 1. The table of contents or straight printout was available alphabetically or chronologically.

The subject matter index had about 20,000 entries, according to defendants' 32 in evidence. Simon testified in deposition in this case at page 42 that there were over—that there were approximately, rather, 400 to 500 key words. The subject matter index was available both in an alphabetical and chronological format.

Among other things, according to Farnsworth's testimony and his declaration, at paragraph 32, some of those key words were violence, Morantz, Holy War, Time, Inc.,

and probably William Crawford. Farnsworth testified credibly that these and other key words were destroyed. He estimated that approximately 180 key words were destroyed. In fact, the subject matter index was the gateway to get at Dederich's pronouncements on these and a variety of other subjects, and Dederich's pronouncements would constitute pronouncements at the highest level of management. Without this index, a search for Dederich's utterances on any given subject would have indeed been like searching for a needle in a haystack.

This was the substance of Dan Garrett's representations to Judge Thompson.

That, the Dederich transcripts were only a fraction of the entire library is beside the point. They were of invaluable significance, and would have been—and would have encompassed, rather, most of the then-current expressions of Dederich on the referable subject. But as previously stated, hundreds of references from the inventory and the index were destroyed from the computer. And notwithstanding that Synanon had purged its computer, it was also disingenuous in responding to the defendants' request for production of April 16, 1980. Item 32 of that request called for, and I quote, transcript index, paren, listing transcripts in Synanon's archives, unparen, unquote.

Attorney Weill was assigned to the response, and this is the same Weill who, with respect to ABCs' seventh request for all communications of Dederich in Formia, item 96 of the seventh request, lodged ten objections, including the priest/penitent, and psychiatrist/patient privileges. This is found in sub-exhibit D, Roman Numeral II to plaintiffs' 16. What Weill gave in response to the defendants' request in this case was eleven pages, constituting simply a listing of transcripts. It was a table of contents—not a subject matter—not even an index. It was certainly not the subject matter index which Simon, in his deposition at page 41 in this case, said was 300 and more pages.

The only index was the subject matter index, not the eleven pages. The subject matter index was also, incidentally, a listing, but the listing which Weill provided was in no event an index. Yet in the face of this, Weill sat on the subject matter index. Moreover, he says that he relied on Simon's deposition, yet Simon, in his deposition, page 30, testified, and I quote, there is no listing of transcripts, unquote. Therefore, if Weill was guided by Simon's deposition, it should have been clear to him that the defendants, being influenced by the same deposition, were seeking the index Simon referred to on pages 40 to 41 of his deposition. It is no answer, in my view, that the defendants could have followed up with a motion to compel. Yes, they could have, but there was an antecedent responsibility to respond fairly and candidly to discover requests.

I next turn to the last issue or last requirement posed by Strothers, and that is whether there was actual prejudice. I doubt whether, in the light of the Hazel Atlas case, that requirement is sound, Hazel Atlas being reported at 322 U.S. 238, 1944. But assuming arguendo that it is sound, the Court makes the following findings and conclusions.

What I have said on the previous subject of alternative sources of evidence is basically dispositive of the issue of actual prejudice. Conduct contrary to public law or policy, whether consisting of violence, terror or the diversion of corporate monies for private purposes, would not be of any consequence unless it was imputed to high management. Without this linkage, the conduct would be considered not policy, but only the random actions of individual and irresponsible members. It is this linkage, the direction and condonation of illegality, that was destroyed, and this destruction was of the very tapes which probably had captured the voices in flagrante delicto.

Where destruction of evidence, wilful destruction of evidence occurs, the inference is that the destruction was of materials adverse to the party who brings about the destruction, and this proposition has been settled in this jurisdiction since Washington Gas Light Company against Biancaniello, B-i-a-n-c-a-n-i-e-l-l-o, reported at 87 U.S. App. D.C. 164.

Accordingly, I conclude that the evidence clearly and convincingly shows that actual prejudice has occurred. I also conclude that all of the other—all of the elements recited in the Strothers case have been established in this case. But there is more than the destruction.

There was a fraudulent cover up of the foregoing destruction of tapes and other materials. Firstly, it was covered up by perjury. Simon testified falsely in his deposition on March 23, 1980. He so admitted to Fleishman in the summer of 1980. Simon also testified in the sanctions hearing before Judge Fauntleroy in November—on November 5, 1981, and in doing so, he corrupted the decisional processes of the Court.

I further find that Simon's false testimony was the product of affirmative collaboration with the legal department.

Secondly, the cover up was aided and abetted by the disingenuous discovery responses of Synanon's legal department. Two examples will suffice. The first example is the one having to do with the transcript or the subject matter index, which I have already alluded to.

Secondly, the answers filed by Synanon on May 16, 1980, to the defendants' second interrogatories filed on April 16, 1980, and in particular to the fifth interrogatory, it seems to me reflects an attitude of coverup, and not the required attitude and response to discovery. The fifth interrogatory asked that the plaintiff, quote, identify all persons who attended the Think Table session on Septem-

ber 5, 1977, unquote. This was the so-called New Religious Posture session.

It later developed, a month before trial, that the defendant knew who the key participants of this session were, and this case—came out—I believe it was August, 1983, when the Springer materials were filed.

MR. KAPLAN: Your Honor, you said defendants. I think you meant plaintiff.

THE COURT: I did mean the plaintiff, the—Synanon.

At that time Synanon identified who the key participants of the session were, yet in response to the interrogatory in 1980, Synanon seized on a deceptive quibble with the interrogatories' use of the word, quote, all, unquote. Synanon evaded any substantive response to the interrogatory on the specious theory that the duty to disclose what is in fact known is excused because that information is less than all which could possibly be known.

That perspective makes a mockery of discovery and that device was employed as a gimmick on several occasions during discovery.

Thirdly, the cover up was assisted by misleading Judge Thompson at the January 18, 1980 hearing on the defendants' motion to compel further discovery. I have already alluded to that hearing previously.

And so we come to the final question, what is the appropriate remedy? the destruction in this case, as I have stated before, was done under the direct aegis of Simon, Director of Archives. But as I have also found, he acted in complicity *with and under* the direction of the legal *department*.

Ms. Flischman has testified to her contacts with Ms. Bourdette. She testified that Simon admitted, against his interest, that he committed perjury and he testified—and that he also stated that he had reviewed what his testi-

mony would be with Mr. Bourdette and that his testimony was a product of that discussion.

That was, as I say, according to Fleishman, admitted by Simon. There's been no testimony to the contrary.

According to Farnsworth, he had discussions regarding the computer purge with Mr. Bourdette. Mr. Bourdette was—is now general counsel for Synanon, and he was, since September 5, 1978, secretary of Synanon. That is demonstrated by plaintiffs' 16, sub-exhibit E, Roman Numeral II.

Chris Haberman, who was an investigator with legal, as I have already found, participated in the destruction of tapes which took place in the Sorkin trailer in October, 1978.

Other high officials of Synanon were in complicity with the destruction. As I have found, David Benz burned tapes. From February 8, 1975 to March 19, 1979, he was the treasurer of Synanon.

So we have destruction at the highest level of the archives, in complicity with legal—that is, the legal department, and also, with high officers of Synanon.

Accordingly, I conclude that the evidence clearly and convincingly establishes a wilful, deliberate and purposeful scheme to, one, destroy extensive amounts of evidence and discoverable materials which probably would have had a dispositive bearing upon Synanon's complaint, that is, its non-profit status, and also the defendants, Bernstein and Kushner's, counterclaim.

The scheme further had as its purpose to cover up and conceal this destruction of evidence and discoverable materials by giving false testimony in deposition and before this Court in the hearing before Judge Fauntleroy, and further, to cover up and conceal the destruction by being disingenuous in the representations before this Court at

the January, 1980 hearing before Judge Thompson, and in its responses to the defendants' discovery.

This constitutes a gross fraud upon the Court of the most grave and serious proportions. Synanon argues that the defendants had made—had made prior motions to dismiss and that that—those motions had been denied. But never before, in any motion, has this Court had the testimony of Fleishman and Farnsworth, which under any conservative standard, constitutes newly discovered evidence.

But even more importantly, Judge Fauntleroy's ruling was procured by false testimony and Synanon cannot benefit by this wrongdoing.

I am mindful that dismissal is a drastic remedy, but I am convinced that there is no intermediate relief or remedy sufficient in the cirucumstances of this case. From the standpoint of the equities of the litigants, dismissal is required. The defendants should not be put at risk because of the absence of testimony. It is not sufficient to say that the jury can listen to all of this evidence and draw its own conclusions and make inferences. That puts the defendants, the victims of the wrongdoing at risk that it can come up with persuasive evidence to capture the minds of the jury.

As I say, it is not fair and equitable to subject the defendants to that jeopardy.

Further, beyond the equities of the litigants, from the standpoint of tampering with the judicial process, the Hazel Atlas case, it seems to me, warrants, indeed requires, dismissal.

I can take notice, and I do, that not only has there been a tampering with evidence in this case, but also in other cases, and it seems to me that that also fortifies the Hazel Atlas approach to this case. There's been a fraud upon this Court, and regrettably, on others.

The motions to dismiss will be granted.

Mr. Kaplan, will you submit an order granting the motions? I don't wish findings to be made. I don't think they are necessary. Merely recite in the order that the Court has made findings and conclusions in open court, pursuant to the rules. I think that the—well, actually, I don't think that findings are necessary in a motion to dismiss, but even if findings are required, the rule—I don't know whether it's 52 or whatever, states that findings in open court will suffice.

Please submit the order by the end of the day.

MR. KAPLAN: Yes, Your Honor.

(Thereupon, at approximately 10:55 a.m., the above-entitled matter was concluded.)

Supreme Court, U.S.
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CLERK

No. 85-1779

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THE SYNANON CHURCH,
Petitioner,

v.

STUART A. BERNSTEIN, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF OF RESPONDENTS BERNSTEIN AND KUSHNER IN OPPOSITION

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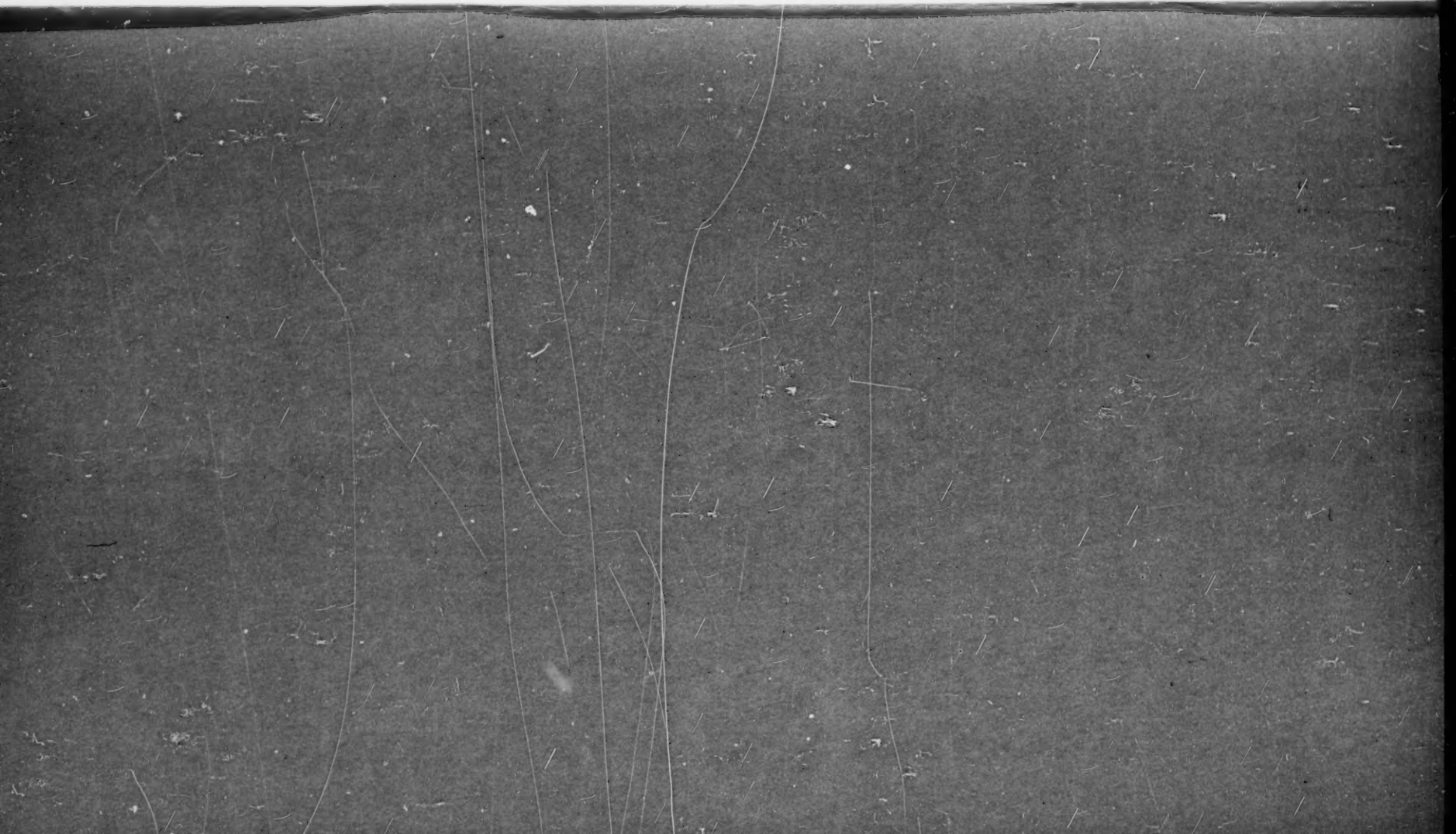

QUESTIONS PRESENTED

The Superior Court of the District of Columbia found by clear and convincing evidence that petitioner The Synanon Church had deliberately destroyed material evidence and had perpetrated a fraud on the court by, among other things, lying about that destruction to the court in order to cover it up. Based on those findings, the court dismissed Synanon's complaint. The District of Columbia Court of Appeals affirmed the dismissal and did not disturb the Superior Court's conclusion that the evidence Synanon had destroyed was material to the merits of Synanon's complaint.

The questions actually presented by the decision below are as follows:

1. Whether this Court should exercise its certiorari jurisdiction to review the decision of the District of Columbia Court of Appeals where that decision turned solely on the local law of the District of Columbia and raised no issues of constitutional or other federal law.

2. Whether there is any real conflict between the decision below and the cases, cited by Synanon, holding that dismissal of the complaint is proper as a sanction for the plaintiff's misconduct in connection with the litigation only if that misconduct related to matters material to the plaintiff's claim, where the Court of Appeals did not hold that the element of materiality is unnecessary and did not disturb the trial court's finding that Synanon's misconduct was in fact material.

3. Whether the issue as to which the petition seeks review was raised below and properly presented in the petition.

LIST OF PARTIES

The parties below were plaintiff Synanon Foundation, Inc. (now known as The Synanon Church), and defendants Stuart A. Bernstein, Samuel J. Kushner, Coldwell Banker & Co., and James H. Kabler, III.

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IN THE

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OCTOBER TERM, 1986

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THE SYNANON CHURCH,
Petitioner,

v.

STUART A. BERNSTEIN, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF OF RESPONDENTS BERNSTEIN AND KUSHNER IN OPPOSITION

Respondents Stuart A. Bernstein and Samuel J. Kushner respectfully request that this Court deny the petition for certiorari, seeking review of the decision of the District of Columbia Court of Appeals in this case. That decision is reported at 503 A.2d 1254.

STATEMENT OF FACTS

Because the petitioner has misstated the holdings of both the trial court and the Court of Appeals, and because it has omitted relevant details concerning the matters at issue below, we are compelled to restate the facts here rather than rely on the petitioner's statement.

Petitioner The Synanon Church ("Synanon") began this action by a complaint seeking a decree of rescission of its contract to purchase an apartment building from respondents Stuart A. Bernstein and Samuel J. Kushner (referred to here as "the owners"). Synanon's purpose in contracting to buy the building was to obtain space it could use, in part, for office purposes. Under the applicable zoning regulations, the building could be used as offices only by "non-profit organizations." D.C. Zoning Regulations § 4104.44. Synanon alleged itself to be such an organization. Synanon alleged in its complaint that the owners' real estate agent fraudulently misrepresented the building's floor-load capacity as sufficient for office use under the District of Columbia Building Code.

Among the owners' defenses to the complaint were several arguments based on their contention that Synanon was not a peaceful, law-abiding charitable organization, but was instead a cult that had adopted a policy of violence and terrorism directed against its perceived enemies.[1] The owners argued that Synanon's policy of violence disqualified it from being a "non-profit organization" under the local zoning regulations, which meant that it could not have used the building for offices as it had intended, and therefore that the owners' alleged misrepresentation that the building was suitable for office use was

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[1]Perhaps the best-known instance in which this policy was put into action was Synanon's attempt to murder Paul Morantz, an attorney who represented clients in litigation against Synanon, by placing a rattlesnake in his mailbox. *See* Appendix to Petition for Certiorari ("Pet. App.") at 42a-43a. Synanon founder and leader Charles Dederich pleaded nolo contendere to charges of conspiracy to commit murder arising from this attack. *See* Exhibit 203 to Defendants' Request for Admissions and Interrogatories to Plaintiff (Oct. 29, 1982); Plaintiff's Response to Defendants' Designation of Specific Incidents of Violence 160 (Sept. 7, 1983).

immaterial. The owners also contended that Synanon was not entitled to the equitable remedy of rescission because its own hands were unclean in that it had fraudulently passed itself off as a non-violent, law-abiding organization when in fact it was devoted to violence. Finally, the owners contended that the real basis for Synanon's decision to seek rescission was not its inability to use the building for office space but the hostile reaction of the building's tenants, who strongly opposed Synanon's purchase of the building after an NBC News documentary exposed it as a violent cult.

The owners began discovery directed at obtaining from Synanon certain specifically enumerated documents and tapes that they believed contained evidence of Synanon's policy of violence. The materials sought were tapes and transcripts of the pronouncements of Synanon's leader, Charles Dederich, and any indices of those tapes and transcripts. Synanon successfully resisted most of this discovery for more than four years on the basis of the sworn representations of its in-house counsel and the testimony of its top corporate officials that the materials requested did not exist. In reliance on these representations, the Superior Court for the most part denied respondents' motions to compel and for sanctions. (For a more complete account of the discovery proceedings below, see Pet. App. 10a-13a.)

Shortly before trial, however, the owners obtained evidence that Synanon had systematically destroyed a great many responsive documents under the direction of its in-house counsel and had covered up this destruction by the perjury of its top officials, again under the direction of its in-house counsel. The Superior Court held an eleven-day evidentiary hearing on those allegations, at which two

former Synanon members who had witnessed and participated in this scheme testified.

The court found that their testimony clearly and convincingly showed "a wilful, deliberate and purposeful scheme to . . . destroy extensive amounts of evidence and discoverable materials which probably would have had a dispositive bearing on Synanon's complaint . . . ." Pet. App. 63a. The court found that the evidence that had been destroyed was material to the question whether Synanon qualified as a non-profit organization eligible to use the building for office purposes under the local zoning regulations, an issue the court found to be "inextricably involved in the entitlement of Synanon to recover." Pet. App. 41a.[2] The court further found that Synanon had concealed this scheme by presenting false testimony and by making false representations in court. *Id.* at 63-64a. The court characterized Synanon's scheme as a "gross fraud upon the court of the most grave and serious proportions" and concluded that the entire course of wrongful conduct had been orchestrated by Synanon's "high officers" and its in-house legal department. Pet. App. 62a-63a. Based on these findings, the court held that the only appropriate sanction was dismissal of Synanon's complaint. Pet. App. 64a.

The District of Columbia Court of Appeals affirmed the Superior Court's action. The Court of Appeals based its decision on the fraud Synanon had perpetrated on the court through the misrepresentations of its attorneys and did not consider whether Synanon's destruction of evidence provided an independent basis for the dismissal.

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[2]Contrary to Synanon's contention, Petition for Certiorari ("Pet.") 5, the Superior Court did not state that Synanon's qualification for non-profit status under the zoning regulations turned on whether Synanon was a tax-exempt organization under I.R.C. § 501(c)(3).

Significantly, the Court of Appeals did not disturb the Superior Court's finding that the evidence that had been destroyed and the misrepresentations by which the destruction was covered up were relevant to the merits of Synanon's complaint. There is no indication in the opinion of the Court of Appeals that the court disagreed with the Superior Court's conclusion on this point. The Court of Appeals simply did not discuss the issue of materiality. The only discussion of materiality by any member of the panel was contained in the separate statement of Judge Mack, who stated her personal belief that the evidence destroyed was not material to Synanon's complaint. Pet. App. 21a-37a. Neither of the other judges on the panel joined in that statement, however.

REASONS WHY THE PETITION SHOULD BE DENIED

I. This Case Does Not Raise the Issues Petitioner Asks this Court to Decide.

Supreme Court review of the decision in this case is inappropriate because the issue that Synanon would have this Court review is not presented by the decision of either of the courts below or by the record. *Cf. Smith v. Butler,* 366 U.S. 161, 161 (1961) (certiorari dismissed as improvidently granted because decision under review "did not turn on the issue on the basis of which certiorari was granted."); *Keller v. Adams-Campbell Co.,* 264 U.S. 314 (1924) (certiorari dismissed as improvidently granted where decision under review did not really pose the issue stated in the petition).

Simply put, Synanon has misstated the question before the Court. In its petition Synanon frames the question presented as whether due process allows the dismissal of a

complaint for the plaintiff's destruction of evidence and perpetration of a fraud on the court where the plaintiff's misconduct is not material to the merits of the plaintiff's claim. Pet. i, 6. The validity of that statement of the issue turns on Synanon's allegation that the District of Columbia Court of Appeals held "implicit[ly]" and "sub silentio" that the evidence Synanon destroyed and the lies Synanon told to cover that destruction up were not material to its complaint but that dismissal was warranted nevertheless.

But the Court of Appeals held nothing of the sort. The truth is that the Court of Appeals did not disturb the Superior Court's explicit finding that the evidence destroyed and the misrepresentations concealing its destruction were material. Nothing in the Court of Appeals's decision gives the slightest hint that the court found any fault in the Superior Court's finding of materiality. Indeed, Synanon can point to nothing in the opinion of the court below to support its reading of the decision, and instead relies entirely on the separate statement of Judge Mack, in which neither of the other members of the panel joined. But the statement of a single member of a three-judge panel does not constitute the opinion of the court. If the other members of the panel had agreed with Judge Mack's conclusion that the evidence destroyed was not material, they would presumably have joined in her statement. There is no rational reason why the views of a single judge should be attributed to the panel as a whole, absent some clear indication that the majority agreed with them. *Cf. San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Commission,* No. 84-1410, slip op. at 31-33 (D.C. Cir. April 25, 1986) (en banc) (statement of dissenting member of agency that agency considered cer-

tain factors is insufficient to establish that such factors were in fact considered).[3]

Consequently, the Superior Court's finding that the evidence destroyed was material remains in effect. *See* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.402[2] at 29 n.17 (1984) ("to the extent that the court of appeals does not consider issues decided by the District Court, the decision of the District Court remains a precedent within the district . . . ."). Because this case does not properly present the question that Synanon asks the Court to decide, the petition for certiorari amounts to a request that this Court render an advisory opinion on an abstract legal question. Whether or not that issue is otherwise "certworthy" – a question we do not address – this is not the case in which it should be decided. *See Smith v. Butler,* 366 U.S. 161; *Keller v. Adams-Campbell Co.,* 264 U.S. 314.

The fact that the Court of Appeals did not hold materiality to be unnecessary also means that the "conflict" that Synanon posits between the decision below and the

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[3]Even if there were a possibility that one of the other panel members secretly agreed with Judge Mack's analysis, granting certiorari would be unwarranted because it would necessarily be based on speculation that the Court of Appeals *might* have held as Synanon argues it did. Such speculation provides far too shaky a basis for this Court to decide questions of constitutional law. *Cf. Simmons v. West Haven Housing Auth.,* 399 U.S. 510 (1970) (appeal dismissed because ambiguity as to basis for decison below made it unclear whether constitutional issue was properly before the Court); *Rescue Army v. Municipal Court,* 331 U.S. 549, 576 (1947) (Court refrains from deciding constitutional issue due to ambiguity as to exactly what state court had decided; to decide constitutional question in those circumstances "would be directly contrary to the policy of avoiding constitutional decisons until the issues are presented with clarity, precision, and certainty").

cases holding that materiality is required is illusory. The Court of Appeals' decision is in no way inconsistent with the cases on which Synanon relies to establish a conflict. Synanon's imagined "conflict" therefore provides no basis for this Court to grant certiorari here. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923) (certiorari dismissed as improvidently granted where decision on review was not really in conflict with other cases).

II. The Question Whether the Evidence Synanon Destroyed Was Material Turns Completely on Interpretation of the Local Law of the District of Columbia and Is Therefore Inappropriate for Review by this Court.

The question whether the evidence that Synanon destroyed was material to its complaint is properly decided on the basis of the purely local zoning regulations promulgated by the District government and of the purely local principles of equitable remedies and common law rules of contracts and torts expounded by the District's courts — matters this Court generally refrains from reviewing. The Court therefore should not grant certiorari to review the Superior Court's determination of materiality.

Whether evidence is material is determined with reference to the elements of the substantive claim in support of which the evidence is offered. *See, e.g., Weinstock v. United States,* 231 F.2d 699, 701 (D.C. Cir. 1956); *Reavis v. United States,* 395 A.2d 75, 78 (D.C. 1978); 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 401[04] (1985). In this case, the owners sought the evidence in question to help establish that Synanon was a violent organization. Proof of Synanon's policy of violence was to be offered to show that Synanon was not a non-profit

organization under D.C. zoning regulations, that it consequently could not use the building for offices as it intended, and that the owners' alleged misrepresentation that the building could be used for office purposes was not a material misrepresentation that could give rise to liability for fraud. The evidence was also to be introduced to prove that Synanon had lied when it held itself out to the owners as a peaceful, law-abiding organization and therefore that it had unclean hands that barred the granting of the equitable relief it sought. The issues of Synanon's status under the zoning rules, of the materiality of the owners' alleged misrepresentations, and of unclean hands as a defense to a claim of rescission all arise from local D.C. law, just as they would arise from state law had the events at issue occurred in Maryland, Virginia, or any of the other forty-eight states.

This Court treats the local law of the District of Columbia as functionally equivalent to state law. *Pernell v. Southall Realty,* 416 U.S. 363, 367-68 (1974). It has therefore been this Court's "longstanding practice . . . not [to] overrul[e] the local courts of the District on local law matters 'save in exceptional circumstances where egregious error has been committed.' " *Id.* at 368-69 (quoting *Fisher v. United States,* 328 U.S. 463, 476 (1946)); *see also United States v. Frady,* 456 U.S. 152, 159 n.8, 162 n.12 (1982); *Griffin v. United States,* 336 U.S. 704, 717 (1949). This case is by no means one of those few extraordinary cases in which this Court's review of questions of local D.C. law is warranted.

The Superior Court's citation of *Bob Jones University v. United States,* 461 U.S. 574 (1983), in its findings from the bench does not mean that its decision was based on federal law rather than the local law of the District of

Columbia. It is clear from the context in which *Bob Jones* was cited that the court relied on *Bob Jones* merely for its recognition of the long-standing common law rule that to qualify as a charity an organization's purposes must not violate public policy. *See id.* at 586-89, 591. The Superior Court looked to *Bob Jones* as analogous authority to be considered in determining the applicable rule of local D.C. law, and not as controlling authority as a matter of federal law. Synanon's long discussion of *Bob Jones* is therefore a red herring; *Bob Jones* does not provide a basis for the Court to review the decision below.[4]

III. The Question as to which Synanon Seeks Review Was Not Raised Below or Properly Presented in the Petition.

Even if the decision below raised a federal issue warranting review by this Court, certiorari should be denied because Synanon did not raise its constitutional

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[4]Synanon's heavy reliance on *Bob Jones* is misplaced in other ways as well. Any limitations that the Court in that case might have implicitly put on the power of the Internal Revenue Service — an executive agency — to determine public policy are irrelevant to the power of courts of general jurisdiction, such as the Superior Court and Court of Appeals below, to interpret and declare the law of their jurisdiction. Indeed, the declaration of public policy has always been a central function of courts under the common law. Nothing in *Bob Jones* limits that power.

Finally, there is no basis for Synanon's claim that the dismissal violated its rights under the first amendment. Pet. 15-16. Contrary to Synanon's contention, the Superior Court did not dismiss the complaint because of discussions among Synanon's members about violence. Nor did the Superior Court find that such discussion showed that Synanon is a violent organization; in fact the court did not even reach the issue of whether Synanon had adopted a policy of violence. Rather, it dismissed the complaint because Synanon had wrongfully destroyed relevant evidence and lied about it to the court. The first amendment offers no protection for such conduct.

claim below. This Court will generally refuse to review questions raised here for the first time. *See, e.g., Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981); *United States v. Santana,* 427 U.S. 38,.41,n.2 (1976); *Adickes v. S.H. Kress and Co.,* 398 U.S. 144, 147 n.2 (1970). Synanon did not argue in either the Superior Court or the Court of Appeals that, *as a matter of due process,* a complaint may not be dismissed due to destruction of evidence unless the evidence destroyed was material. Although Synanon argued below that the evidence it destroyed was not material, it never contended that the element of materiality was constitutionally required. The only due process argument that Synanon advanced in the Court of Appeals was the claim that it was denied an adequate hearing because it allegedly had no notice of the issues to be decided. Synanon has now abandoned that argument, however, as it is not listed as one of the Questions Presented. *See* S. Ct. R. 21.1(a) ("Only the questions set forth in the petition or fairly included therein will be considered by the Court."). Synanon's petition glosses over its failure to raise its constitutional argument in the courts below. It states that it had argued that the evidence destroyed was not material, but it neglects to mention that it never based that argument on the due process clause.

Moreover, Synanon failed to comply with the procedural rule requiring a detailed statement of how and when the federal question advanced in the petition was raised and decided in the court below. Supreme Court Rule 21.1(h) provides that when the petition seeks review of a state court judgment, the statement of the case must "specify the stages in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; [and] the method or manner of raising them and the way in which they were passed on by the court . . . ."

The local courts of the District of Columbia are regarded as state courts for the purposes of this Court's certiorari jurisdiction. 28 U.S.C. § 1257. Synanon was therefore required to comply with Rule 21.1(h), but has not made even a token effort to do so.

Synanon's failure to raise its due process objection below and to comply with the rules of this Court provide an independent reason why the Court should not review the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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REPLY BRIEF TO BRIEF OF RESPONDENTS BERNSTEIN AND KUSHNER IN OPPOSITION

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REPLY BRIEF TO BRIEF OF RESPONDENTS BERNSTEIN AND KUSHNER IN OPPOSITION

The Brief in Opposition highlights exactly what this case is about. The confusion of the Respondents is exactly the confusion of the majority below and demonstrates that the Due Process issue arises solely as a result of the decision of the District of Columbia Court of Appeals.

The arguments before the trial court and before the Court of Appeals went to whether any alleged misconduct, including destruction of evidence, was material to the issues before the courts below. The Petitioner argued to the trial judge that any of the

alleged misconduct or missing documents were not material to the case before the court and that, therefore, the motion for sanctions before that court should be denied. The Respondents argued that the missing documents and misconduct were in fact material to the matter before the trial court. That argument was continued on appeal.

All of these arguments to both trial court and the Court of Appeals were bottomed upon the premise that no dismissal of Synanon's complaint could be ordered unless an express finding of materiality were made. At no time did Respondents dispute that materiality was a necessary factor.

For the first time in the opinion of the Court of Appeals there was a ruling, necessary to the outcome of the case in that court, that materiality is not a factor essential to the sanctions imposed. Thus, for the first time in this case—and in apparent conflict with all other authority—the materiality requirement of the Due Process Clause was ignored.

This decision that materiality is not necessary to the most severe of sanctions is of great significance. This Court is aware of the ever increasing use of sanctions by the courts throughout the nation. As was stated in the Petition for a Writ of Certiorari, no argument is made that the use of sanctions, or even the increased use of sanctions, is wrong: as long as the protections of Due Process are adhered to assiduously. This case illustrates well the dangers to the unpopular litigant when Due Process protections are brushed aside.

Respondents have objected to Petitioner's references to the Separate Opinion below. First, it should

be noted that the Separate Opinion is not a dissent, and thus must be treated differently. Second, it is an opinion by the author of the court's major opinion, and must be given weight accordingly. But even more important is the fact that it demonstrates that the issue of materiality was before the Court of Appeals and that the major opinion of that court constituted a ruling that materiality was not a factor essential to the imposition of sanctions: the very Due Process issue that is before this Court in the Petition.

Respondents also argue (Brief in Opp. p. 2) that the non-profit status of Synanon was relevant to the Complaint, since non-profit status affected the *use* of the premises under contract. However, the suit was over a contract to *buy* the premises and a misrepresentation that it could be used by a non-profit organization. Respondent Bernstein owned the building. He was not a non-profit entity. This case was bottomed on allegations that Bernstein, et al., deceived Synanon in connection with a contract to *buy* the premises. Nonprofit status is and always has been irrelevant to the ability to buy and own. If the contract had gone through—and if Synanon were, arguendo, not a non-profit organization—there would be one for-profit owner replacing another for-profit owner. If Synanon were not able to use the building, it could always choose to lease it or sell it to others. Thus, as Respondents (Brief in Opp., p. 2) and the author of the Separate Opinion make crystal clear, non-profit status is totally immaterial to the liability issue in this case.

For the foregoing reason, and those put forth in the Petition for a Writ of Certiorari, it is respectfully urged that the Petition be granted.

Respectfully submitted,

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